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Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Report of the Working Group on the Right to Development on its fifteenth session (Geneva, 12-16 May 2014)

Chair-Rapporteur: Tamara Kunanayakam (Sri Lanka)

* Annex II to the present report is circulated in the language of submission only.

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I. Introduction

1. The open-ended Working Group on the Right to Development was established pursuant to Commission on Human Rights resolution 1998/72, endorsed by the Economic and Social Council in its decision 1998/269, initially for a period of three years, to meet for a period of five working days each year, with a mandate to monitor and review progress made in the promotion and implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment, focusing each year on specific commitments in the Declaration; to review reports and any other information submitted by States, United Nations agencies, other relevant international organizations and non-governmental organizations (NGOs) on the relationship between their activities and the right to development; and to present for the consideration of the Commission on Human Rights a sessional report on its deliberations, including advice to the Office of the United Nations High Commissioner for Human Rights (OHCHR) with regard to the implementation of the right to development, and suggesting possible programmes of technical assistance at the request of interested countries with the aim of promoting the implementation of the right to development. The Commission also decided that an independent expert should be appointed by its Chairman, initially for a period of three years, with a mandate to present to the Working Group at each of its sessions a study on the current state of progress in the implementation of the right to development, taking into account, inter alia, the deliberations and suggestions of the Working Group.
2. In its resolution 2000/5, the Commission on Human Rights welcomed the consensus reached between all parties on the need for the Working Group to convene in two sessions, of five days each, before the fifty-seventh session of the Commission.
3. In view of the urgent need to make further progress towards the realization of the right to development as elaborated in the Declaration on the Right to Development, the Commission, in its resolution 2001/9, decided to extend the mandate of the Working Group for one year and the mandate of the independent expert for three years.
4. In resolution 2002/69, the Commission on Human Rights emphasized the international economic and financial issues that deserved particular attention by the Working Group, and decided to extend its mandate by one year to continue important deliberations and deepening dialogue on the operationalization of the right to development.
5. In resolution 2003/83, the Commission on Human Rights decided to renew the mandate of the Working Group for one year and to convene it, for a period of 10 working days, to consider the report of the independent expert on the right to development as well as the outcome of a two-day high-level seminar on effective strategies for mainstreaming the right to development in the policies and operational activities of the major international organizations/institutions, to be organized by the United Nations High Commissioner for Human Rights within the 10 working days allocated to the Working Group.
6. In resolution 2004/7, the Commission decided to renew the mandate of the Working Group for one year, to meet for 10 working days. It also endorsed the recommendation of the Working Group at its fifth session to establish, for an initial period of one year, a high-level task force on the implementation of the right to development, within the framework of the Working Group and in accordance with the terms of reference defined by it, to assist it in fulfilling its mandate as contained in paragraph 10 (a) of Commission resolution 1998/72, and to allocate to the task force 5 of the 10 working days allocated to the Working Group.

7. In resolution 2005/4, the Commission decided to renew the mandate of the Working Group for one year and to convene it for a period of 10 working days, 5 of them to be allocated to a second meeting of the high-level task force. It endorsed the recommendation of the Working Group at its sixth session to extend the mandate of the high-level task force for a further period of one year to examine Millennium Development Goal 8, on global partnership for development, and suggest criteria for its periodic evaluation, with the aim of improving the effectiveness of global partnerships with regard to the realization of the right to development.

8. In its resolution 1/4, the Human Rights Council endorsed the conclusions and recommendations of the Working Group at its seventh session, *inter alia* to renew the mandate of the high-level task force for a further period of one year to enable it to apply the criteria enumerated in its report, on a pilot basis, to selected partnerships, with a view to operationalizing and progressively developing those criteria. The Council also decided to renew the mandate of the Working Group for a period of one year, to meet for a period of five working days to consider the findings and recommendations of the task force and further initiatives in accordance with its mandate, and requested the high-level task force to meet for a period of five working days.

9. In resolution 4/4, the Human Rights Council endorsed the road map outlined in paragraphs 52 to 54 of the Working Group's report on its eighth session, including a request to the high-level task force to consolidate its findings and present a revised list of right to development criteria along with corresponding operational subcriteria and outline suggestions for further work, including aspects of international cooperation not covered until then. The Council decided that the criteria, as endorsed by the Working Group, should be used, as appropriate, in the elaboration of a comprehensive and coherent set of standards for the implementation of the right to development, and that, upon completion of the above phases, the Working Group should take appropriate steps to ensure respect for and the practical application of those standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement. In the same resolution, the Council also decided to renew the Working Group's mandate for a period of two years, to convene in annual sessions of five working days, and to renew the mandate of the high-level task force for a period of two years, to convene in annual sessions of seven working days.

10. In resolution 9/3 and in successive resolutions,¹ most recently resolution 24/4, the Human Rights Council reiterated the tasks entrusted to the Working Group in resolution 4/4, the purposes set out therein for which the criteria would serve once considered, revised and endorsed by the Working Group, and the steps to be taken by the Working Group upon completion. In resolution 9/3, the Council decided to renew the mandate of the Working Group until it had completed those tasks, and that it should convene annual sessions of five working days. The Council also decided to renew the mandate of the high-level task force until the eleventh session of the Working Group, in 2010, and that the task force would convene annual sessions of seven working days.

11. In resolution 12/23, the Human Rights Council tasked the Working Group to consider, revise and endorse the right to development criteria and corresponding operational subcriteria.

12. In resolution 21/32, the Human Rights Council welcomed the launching in the Working Group of the process of considering, revising and refining the draft right to

¹ Human Rights Council resolutions 12/23, 15/25, 18/26 and 19/34.

development criteria and corresponding operational subcriteria, with the first reading of the draft criteria; acknowledged the need to further consider, revise and refine them; endorsed the recommendation of the Working Group that it pursue, at its fourteenth session, consideration of the draft operational subcriteria; decided to convene a two-day informal inter-sessional intergovernmental meeting of the Working Group with the participation of States, groups of States and relevant United Nations agencies, funds and programmes and institutions, as well as other multilateral institutions and forums, international organizations and relevant stakeholders, with a view to improve its effectiveness at its fourteenth session; and decided to consider the extension of the meeting time of the Working Group, as appropriate.

13. In resolution 24/4, the Human Rights Council endorsed the recommendation of the Working Group that it continue, at its fifteenth session, work on the consideration of the draft operational subcriteria with the first reading of the remaining operational subcriteria. The Council also decided to convene a two-day informal inter-sessional intergovernmental meeting of the Working Group with a view to improve its effectiveness at its fifteenth session, and reiterated its decision to consider the extension of the meeting time of the Working Group, as appropriate.

14. The Working Group accordingly held a two-day informal inter-sessional meeting on 3 and 4 April 2014, and convened its fifteenth session in Geneva from 12 to 16 May 2014.

II. Organization of the session

15. In her opening statement,² the High Commissioner for Human Rights underscored the progress made in the recognition of the transformative potential of the right to development. It was now widely acknowledged that the right to development could contribute to a new paradigm for sustainable and equitable social justice built on the firm normative foundations of human rights. The High Commissioner recalled that it was mandatory to meet the needs of future generations, so that they could enjoy rights and economic opportunities in conditions of dignity and sustainability. She called upon the Working Group to guide the international community with a view to positioning the right to development in the post-2015 development agenda. The parameters of the right to development could inform the global debate on creating development that freed all human beings from fear and want. Procedurally and substantially, the post-2015 development agenda must have the right to development at its core. The new development agenda's goals, targets and indicators must explicitly align the development framework with human rights, including the right to development. Furthermore, the new development agenda must include a strong accountability framework that clearly identified the holders of rights and those responsible for fulfilling rights. It must also define mechanisms at all levels to ensure that relevant institutions were answerable for meeting their responsibilities, and were subject to enforceability where they did not deliver. Every human person and all peoples were entitled to a development process in which all human rights could be fully realized. That recognition was at the core of the human rights-based approach to development, and the responsibility for such development should be expanded to include actors in the private sector, notably large and transnational corporations.

² The full text of the High Commissioner's statement is available from www.ohchr.org/EN/Issues/Development/Pages/15thSession.aspx.

16. At its first meeting, on 12 May 2014, the Working Group re-elected by acclamation Tamara Kunanayakam (Sri Lanka) as Chair-Rapporteur. In her opening statement,³ the Chair-Rapporteur reported on activities since the previous session of the Working Group, namely the informal consultations and the informal inter-sessional meeting. In addition, she reported on the results of her interactive dialogue at the twenty-fourth session of the Human Rights Council and at the sixty-eighth session of the General Assembly. During its previous two sessions, the Working Group had completed the first reading of the criteria and the first part of the operational subcriteria, aided by the submission of detailed views and comments. It had also been assisted by the active participation of United Nations funds and programmes, NGOs and indigenous peoples' groups.

17. The Chair-Rapporteur reminded the Working Group that the first reading of the draft operational subcriteria was part of a broader and longer-term process. She recalled Human Rights Council resolution 24/4, in which the Council had decided that, once considered, revised and endorsed by the Working Group, the criteria and corresponding operational subcriteria should be used, as appropriate, in the elaboration of a comprehensive and coherent set of standards for the implementation of the right to development, and that the Working Group should take appropriate steps to ensure the practical application of the standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement.

18. Several proposals had emerged from the inter-sessional meetings on improving the effectiveness of the fifteenth session, and they remained on the table. She expressed the hope that, following past tradition, the Group's conclusions and recommendations would be adopted by consensus.

19. The Chair-Rapporteur drew attention to the context in which the fifteenth session was being held. The International Year of Small Island Developing States was a reminder of the gravity of the current global crisis, its multidimensional and systemic character and the urgent need for collective action when those States were facing unprecedented challenges in achieving development, with climate change threatening their very existence. Rising inequalities, within and between countries, unequally affecting those more closely integrated in the global market and less resilient to external influences, along with intensifying exploitation and social injustice, posed a threat to international peace and security, as well as to the ability of the planet to sustain life. There was increasing recognition that inequality was a key issue that had been neglected in the Millennium Development Goals.

20. The post-2015 process provided an opportunity for the Working Group to contribute actively to shaping the development agenda. With the mandate to promote a vision of development based on the principles of equality, non-discrimination, social justice, participation and solidarity at national and international levels, and international cooperation, and also to mainstream the right to development in the United Nations system, the Working Group was in a privileged position to contribute significantly to advancing the framework for an alternative vision of society, based on values and principles, and in harmony with the environment, so that life with dignity became a reality for all without discrimination, for present and future generations.

21. She expressed the hope that the fifteenth anniversary of the Working Group would provide inspiration to move forward with the sense of urgency that the current global

³ The Chair-Rapporteur's opening statement is available from www.ohchr.org/EN/Issues/Development/Pages/15thSession.aspx.

situation demanded, to confront and eliminate the obstacles standing in the way of development, to translate commitments into concrete action and to create the conditions for the enjoyment of the inalienable right to development for all peoples, everywhere.

22. At its first meeting, the Working Group adopted the agenda (see annex I) and programme of work of its fifteenth session.

23. During the session, the Working Group finalized the first reading of the remaining draft right to development operational subcriteria proposed by the high-level task force on the implementation of the right to development. It also proposed draft operational subcriteria for new draft criteria that were proposed during the Group's thirteenth session. For that purpose, the Working Group had before it two conference room papers (A/HRC/WG.2/15/CRP.3 and 4) containing, respectively, submissions received from Governments, groups of Governments and regional groups, and from other stakeholders.

III. Summary of proceedings

A. General statements

24. On behalf of the Non-Aligned Movement (NAM), the Islamic Republic of Iran stated that the right to development must be given the high profile it deserved. It expressed serious concern that, despite longstanding efforts, progress had been slow and obstacles to realizing the right to development still persisted. The challenges were becoming more complex and it was now more than ever necessary to make the right to development a reality for all. The United Nations system organizations, including in the areas of finance and trade, must be involved and all relevant bodies should be engaged in mainstreaming the right to development into their objectives, policies and programmes. NAM stressed its unwavering commitment to the right to development, an individual and collective right involving individual, national and international responsibilities, and requiring a balance between national and international responsibilities. All human rights were interdependent and mutually reinforcing. The Working Group must continue the first reading of the criteria and subcriteria and proceed to the second reading. Once adopted, they would be comprehensive and coherent standards, providing a basis for international legal standards of a binding nature. They would enable implementation of the Declaration on the Right to Development. The ultimate goal of that process was the implementation of the right to development for all human beings.

25. The European Union (EU) expressed its strong commitment to sustainable development, the eradication of poverty and equitable globalization. It reiterated its support for the right to development, on the basis of the indivisibility and interdependence of all human rights and the multidimensional nature of development strategies. While national development efforts must be supported, States had primary responsibility for the realization of the right to development by their citizens. The ambitious programme of work of the Working Group was attainable and EU was willing to pursue a consensual approach to rise above polarization and focus on what united rather than what divided.

26. Pakistan, on behalf of the Organization of the Islamic Conference (OIC), stated that realizing the right to development was crucial to the realization of all other human rights, including in the industrialized world, and called for collective responsibility of all human beings. Realization of the right to development required political commitment and resources. Sustainable development demanded efforts at the national level, which should be supported at the international level through collective efforts. The goal of sustainable development must become a reality on the ground. The Working Group should proceed to the second reading, and extension of its meeting time should be considered.

27. Speaking on behalf of the African Group and aligning itself with NAM, Ethiopia affirmed the great importance attached to the right to development, also enshrined in the African Charter on Human and Peoples' Rights. While States had the primary responsibility for realizing the right to development, there was an urgent need for a just and enabling international economic order and a responsive and accountable global financial architecture. States should have the necessary policy space to determine policies suited to their specific conditions. Ethiopia stressed that the right to development must be included in the post-2015 development agenda and the necessary framework for international cooperation, and reiterated the call for a legally binding instrument to ensure the full implementation of the right to development.

28. Aligning itself with NAM, Sri Lanka stated that the right to development was about mainstreaming and implementing development-oriented policies at all levels, to improve the capacity of States to ensure the full enjoyment of all human rights. The right to development was the basis for sustainable development, in all its three dimensions. Asserting that the eradication of poverty was the most urgent human rights goal, Sri Lanka called for greater focus on the special needs of developing countries and advocated the integration of youth participation in the post-2015 agenda.

29. Aligning itself with NAM, Cuba stated that the right to development was an inalienable right of individuals and peoples, and its achievement required international cooperation and the creation of a conducive international environment. The adverse consequences of the neo-liberal agenda posed obstacles to developing countries and also affected developed countries. Much could be achieved with a genuine will on the part of developed countries. For the people of Cuba, the main obstacle to enjoying the right to development was the unjustified economic embargo by the United States of America for over 50 years. Cuba rejected all attempts to redefine the right to development and to limit its international scope, including with regard to trade and financial institutions.

30. Sri Lanka reiterated that it was imperative that the Declaration on the Right to Development should be the basis for further consideration, revision and refinement of the criteria and subcriteria in order to achieve real progress, and that effective international cooperation was essential to address the international obstacles and create an international climate conducive to the realization of the right to development.

31. China expressed its support for NAM and remarked that the right to development required a development-based and human-centred approach and the establishment of a new international economic order which removed obstacles to development faced by developing countries. The commitment to the Millennium Development Goals must be honoured and the post-2015 agenda must put development at its heart. Developed countries must adopt responsible macroeconomic policies, and international development cooperation must respect the development paths of all countries, the diversity of development patterns and different levels of development. An open, interconnected world economy, a cooperative and mutually beneficial global partnership, and transfer of technology must be promoted and supported.

32. South Africa aligned itself with the African Group and NAM. It consistently advocated for the right to development, which presented a holistic, cohesive and integrated framework for advancing development and for achieving the Millennium Development Goals and all three dimensions of sustainable development. The eradication of poverty and hunger, and combating inequality must be at the centre of the global agenda and partnership for development, which must acknowledge different levels of development and uphold common but differentiated responsibilities. South Africa reiterated the need for reform and democratization of global institutions, including the Security Council and the Bretton Woods Institutions, and the need to ensure the accountability of transnational corporations. It expressed dismay at the slow pace of progress in the Working Group.

33. Venezuela aligned itself with NAM and reiterated the sentiments expressed by Cuba. It reaffirmed that the post-2015 development agenda must fully integrate the right to development, which was essential to human rights. Unilateral coercive measures against developing countries hampered economic development and set aside international solidarity. The international community must create an enabling environment for the full enjoyment of all human rights. The prevailing economic system promoted climate change, including through the activities of transnational corporations. Lack of transfer of technology also compromised development.

34. Aligning itself with NAM and OIC, Malaysia asserted that the Working Group was a pillar for upholding the right to development. Differences in viewpoints were natural because of divergent approaches to development, differences in the economic, social and cultural particularities of countries and diversity in perspectives. Participation by all was important for a holistic process. While responsibilities lay primarily with States, international cooperation was essential for realizing the right to development. It was important to complete the task at hand in a spirit of constructive engagement, and that the meeting duration be increased to two weeks.

35. Indonesia, aligning itself with NAM and OIC, pledged its full commitment to the right to development, which encompassed all human rights. While States had the primary responsibility for realizing the right to development, international cooperation for the creation of an enabling environment was crucial. The right to development must be mainstreamed in all development processes throughout the United Nations system.

36. Morocco aligned itself with NAM, the African Group and OIC, and highlighted the importance of the Declaration on the Right to Development. The right to development could not be disassociated from other rights. It was a right of human beings, as well as of nations, and called for greater political commitment, through development cooperation and assistance. It was a priority in overcoming vulnerabilities and required the sharing of national and international responsibilities. Morocco shared concerns about the slow pace of progress on the mandate of the Working Group and called on Member States to be led by wisdom and to adopt a humanistic and consensual approach.

37. Switzerland believed the right to development could bring human rights and development closer together and was yet another means to promote all human rights. Indeed, while the full implementation of human rights for all was the ultimate goal of development and human rights should thus be used to measure the outcomes of development, governance principles and the rule of law were also paramount for shaping the process of development at the national and international levels. In that context, Switzerland reaffirmed the universality, indivisibility, interrelatedness, interdependence and mutually reinforcing nature of all civil, cultural, economic, political and social rights, including the right to development; those human rights should be realized for all, without any discrimination. Concerning the post-2015 development agenda, respect for and the promotion of all human rights, including the right to development, and how to make them accountable and to whom were the key issue. Switzerland did not subscribe to the view that the Working Group should discuss the post-2015 development agenda at the current stage, since it did not want to prejudge the discussions going on in New York on that issue. But it would not oppose the Working Group discussing it at a later stage. Finally, the Working Group should complete at the current session the first reading of the draft right to development criteria and very operational subcriteria, in the absence of a meaningful discussion on the issue of indicators that was fundamental to Switzerland.

38. The United States of America asserted that the right to development must be unifying rather than divisive and expressed its willingness to engage constructively in the Working Group. It expressed the need for a shared consensus on the definition and nature of the right to development and welcomed the participation of experts, civil society and

private actors. With regard to the process going forward, an empirical approach was a critical need and, in that context, some sort of measurable elements were necessary. That approach was not intended to rank and criticize States, but rather, as described by the High Commissioner for Human Rights, to be a potential bridge between human rights and development. While the United States recognized that some delegations believed the high-level task force was not mandated to produce indicators, operational subcriteria had been proposed by it and were referred to in Human Rights Council resolutions. The task force's operational subcriteria included indicators. The United States was prepared to seek consensus through the incorporation of measurability into the subcriteria. With regard to substance, the focus needed to be on universal human rights, which individuals enjoyed and might demand from their own governments, including civil and political, as well as economic, social and cultural rights. International financial institutions had no human rights obligations and States had no human rights. Instead, States had human rights obligations towards their citizens. The United States emphasized the importance of focusing on factors that included non-discrimination by States, democracy, good governance and social protection policies, including such related aspects as labour organization, women's rights, the prevention of violence against women and girls, and ways to protect, include and empower members of minority and vulnerable groups. Much development came from private sources and that fact warranted the Working Group's consideration.

39. Speaking on behalf of OHCHR, the Chief of the Development and Economic and Social Issues Branch presented the work of the Office on the post-2015 development agenda. The Office was actively engaged in the Open Working Group on Sustainable Development Goals, and the Declaration on the Right to Development was central to OHCHR advocacy. The Working Group on the Right to Development was particularly relevant to the making of the new agenda and goals. The Millennium Development Goals left several gaps, including lack of accountability. The OHCHR approach was to integrate all human rights through research, advocacy and engagement with States, civil society and others. The High Commissioner was engaged in the process and, in an open letter to all Member States, had called for a new, universal and balanced development agenda, which upheld all human rights. She had emphasized the need to focus on equality, the right to development and the accountability of all actors. The Office gave technical support, including in a briefing paper dedicated to human rights and the right to development. OHCHR had stated that the current model of development was imbalanced and unsustainable and the global crises had exacerbated inequalities, both within and between countries. The focus on average statistics and aggregates was the main failing of the Millennium Development Goals. The new agenda must enable the measuring of outcomes and efforts, and disaggregation, and all targets and indicators must be aligned with human rights standards.

40. OHCHR had called for a new development agenda, which promoted and protected freedom from fear and want for all people without discrimination. Its central objective must be the eradication of extreme poverty. Inequalities should be a central concern, and the related but different notions of non-discrimination, equity and equality must be integrated and reflected across all the goals. Inequality must be disaggregated and dedicated targets and goals must be adopted for target groups. Attention should be paid to marginalized groups and those bearing unequal environmental burdens, such as small island developing States. The Declaration on the Right to Development placed people at the centre of development, called for an enabling environment and addressed both national and international constraints on development. Enhanced international cooperation and human rights-based policy coherence were needed to ensure that global rules and policies were consistent with human rights law. The new agenda must contain explicit provisions to remove obstacles to development, for instance in trade, investment and intellectual property systems, which undermined human rights. Meaningful reforms at the international level and

the democratization of institutions of global governance were essential. States must have the policy space to protect the human rights of their people and must be held accountable. Strong accountability mechanisms must be put in place and private actors must be held to account, including through due diligence, human rights impact assessments and the Guiding Principles on Business and Human Rights. The new goals must be universally applicable while taking into account different national realities. The right to development provided substance to article 28 of the Universal Declaration of Human Rights, which called for a social and international order in which all human rights could be realized.

41. The World Meteorological Organization (WMO) stated that climate change must be addressed and that the right to information and access to information were critical in relation to the environment and climate, and were also in line with the right to development. Some countries had acknowledged the importance of climate change in their constitutions. Scientific predictions and information must be factored into policies, and the sharing of information and access to data were essential. WMO facilitated free and unrestricted exchange of data for environmental protection. It was supporting an initiative for the recovery and collection of historical data from past colonial institutions for vulnerable countries. That was important for the assessment of long-term trends. WMO contributed to the fulfilment of human rights by supporting peoples' safety and security from weather, water and natural hazards.

42. The United Nations Children's Fund perceived a close linkage between the right to development and children's rights and welcomed the focus on sustainable, human-centred, rights-based development and equity. Children were the basis for future generations. Their vulnerabilities were interdependent; addressing those vulnerabilities comprehensively was important for improving their lives. The reduction of inequalities, the protection of children's rights, the strengthening of social services and the protection of women and children must be reflected in the efforts of the Working Group. There must be tangible results for the most excluded in society. That required data disaggregated by age, and data on all grounds of discrimination, including sex, age, race, ethnicity and income, relevant to countries and their contexts. The Working Group's discussions must contribute to the post-2015 process, as the right to development pointed in the same direction as the sustainable development goals of eradicating poverty, enhancing the sharing of resources and fostering intergenerational equity.

43. The International Telecommunication Union (ITU) promoted and ensured access to the benefits of scientific progress, which was one of the attributes of the right to development. International and communications technology and broadband could enhance the quality of life, improve access to information and empower people to participate in local and national development and to exercise their rights. Referring to article 19 of the Universal Declaration of Human Rights, ITU asserted that the digital divide must be bridged through improved awareness, access and inclusion of the most vulnerable. The digital revolution was also providing tools for poverty reduction, and information and communications technology could narrow the pervasive divides within countries, for instance between urban, rural and other populations, and between developed and developing countries.

44. Speaking on behalf of the Catholic-inspired Working Group for the Right to Development and International Solidarity, the Association Comunità Papa Giovanni XXIII appealed to Member States to overcome the political impasse in the Working Group and move from rhetoric to action. That group of non-governmental organizations had submitted three written contributions on the revision of criteria and operational subcriteria. It proposed the compilation of a report reflecting all comments on the first reading before proceeding to the second reading. Between the first and second readings, the group proposed a two-year phase of implementation to ensure the effectiveness of the criteria and

subcriteria. It suggested that experts be selected at the national level and tasked with making proposals on indicators. The Working Group must listen to the people whose lives depended on the implementation of the right to development. The collection of good practices and the involvement of national organizations could support its work.

45. The International Youth and Student Movement for the United Nations recalled that, in 1986, the overwhelming majority of Member States had supported the Declaration on the Right to Development. That right was necessary for the enjoyment of all other human rights and must eventually be embodied in a legally binding framework. The Movement expressed difficulty in understanding how some States continued to object to the substance of the right to development or a legally binding framework. It called on all to strongly commit themselves to the right to development. That was required by morality, as well as by law, as that right was part of customary international law. The Movement perceived a challenge in the discussion of measurability by States that had not all unambiguously agreed on the right to development. Every major human rights instrument had been created by first agreeing on a legal obligation and defining the core principles, and only then considering mechanisms to measure whether or not a right was being respected. Only if all parties agreed on the legal obligation could that measurement be discussed. It urged States to cooperate on the right to development and called on the Working Group to consider how it could contribute to the Open Working Group in defining the post-2015 development agenda and sustainable development goals.

46. Friedrich Ebert Stiftung asserted that the right to development belonged to individuals and peoples, and its implementation was crucial to the post-2015 development agenda. Implementation must take place at all levels, from local to global. Friedrich Ebert Stiftung suggested that, on completion of the first reading of the criteria and subcriteria, the Working Group should request the Human Rights Council to mandate its Advisory Committee to support work on measurement and monitoring, building on the work done in the Sub-Commission which had not received any follow-up. Expert advice could serve to unlock political debate and the work of the high-level task force could provide useful guidance. It was necessary to look at the options for the way forward and for the monitoring and measurability, as well as the legal standing, of the right to development.

47. The China NGO Network for International Exchanges stated that the criteria and subcriteria represented a historic milestone on the right to development. In the pursuit of sustainable development, it was necessary to look at the right to development, rights-based development and the human rights-based approach; and national and international obligations. States were not denied rights under the right to development, the biggest obstacle to which was the unequal world order. The right to development supported all countries to have equal opportunities for development. In the spirit of the Declaration on the Right to Development, that right promoted global justice. It supported the solution of problems of poverty, North-South inequality, inequality in financial systems and an unequal international and social order. The right to development encompassed all human rights, but was not limited to the sum total of all human rights in the two International Covenants; rather, it built on them and added further value to them. Human rights provided for protection at the national level, while the right to development needed to be implemented first at the international level. While States had the primary responsibility at the national level, the right to development required differentiated standards and responsibilities at the international level. It called for greater inclusiveness and participation in global governance, and required addressing not only outcomes, but also policies. The proposed indicators were mostly national rather than international, and more indicators were needed for the global level. The right to development required an institutional guarantee and was not about international charity. National and international obligations must be given more content, and a regional dimension should also be included.

48. The full text of general statements made available to the secretariat is posted on the OHCHR website (www.ohchr.org).

B. Inter-sessional meeting and informal consultations by the Chair

49. The Chair-Rapporteur reported⁴ on the informal inter-sessional meeting of the Working Group, which was held on 3 and 4 April 2014 in accordance with Human Rights Council resolution 24/4. She also reported on the informal consultations she had held with coordinators of regional and political groups, United Nations system organizations and intergovernmental bodies, as well as non-governmental organizations, in preparation for the informal inter-sessional meeting of the Working Group and its fifteenth session.

50. The main issue discussed was how to most effectively utilize the time should the Working Group complete the first reading of the criteria and operational subcriteria before the end of its fifteenth session. Groups of States representing developing countries had proposed that, in line with its mandate to consider, revise and refine the draft right to development criteria and corresponding operational subcriteria, the Group should proceed with the second reading. Others stated that the measurability element must first be clarified.

51. Some concerns raised related to the overall orientation of the Working Group and whether the review exercise was expedient for elaborating a legally binding instrument, and in that context a broader discussion had been proposed on how best to achieve the ultimate goal. There had also been a suggestion that the Working Group should consider adopting a position on the right to development for incorporation in the post-2015 development agenda.

52. During consultations with NGOs, the importance of addressing the problem of unilateral coercive measures was underlined. Ways needed to be found to integrate youth concerns more concretely into the draft right to development criteria, and modalities established to enable indigenous peoples to participate in the work of the Working Group on an equal basis.

53. With respect to the inter-sessional meeting, the Chair-Rapporteur reported that, at the outset of the meeting, she had underlined the need for the Group to bear in mind its larger mandate when carrying out the specific task entrusted to it for the fifteenth session. In its resolution 4/4 and in subsequent resolutions, the Human Rights Council had decided that, once considered, revised and endorsed, the criteria and subcriteria should be used, as appropriate, in the elaboration of a comprehensive and coherent set of right to development standards for the implementation of the right to development, and that the Working Group should take appropriate steps for ensuring respect for and the application of those standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement.

54. The Working Group's original mandate in Commission on Human Rights resolution 1998/72 was to monitor progress on the implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels, provide recommendations and further analyse obstacles to its enjoyment.

55. Several proposals had been made with a view to improving the effectiveness of work at the fifteenth session, but no agreement had been reached. Many developing country

⁴ The Chair-Rapporteur's oral report on the informal inter-sessional meeting of the Working Group is available from www.ohchr.org/EN/Issues/Development/Pages/15thSession.aspx.

representatives had expressed concern that none of the NAM proposals had been accepted, and the Secretariat had been called upon to clarify the voting procedure. NAM had expressed the view that while consensus must be the aim, voting might become necessary if, despite all efforts, consensus could not be reached.

56. The Chair proceeded to summarize the various proposals made and the discussions on the proposals.

57. NAM had proposed that, after completion of the first reading and in line with the mandate to consider, revise and refine the draft right to development criteria and corresponding operational subcriteria with a view to their endorsement, the Group recommend to the Human Rights Council that it proceed to the second reading at its sixteenth session and, in that regard, flagged the need for more time to be allocated to the Working Group.

58. In that respect, EU, the United States and Switzerland had stated that the issue of measurability must be clarified before proceeding to the second reading and that it was too early to discuss the conclusions and recommendations of the Group's fifteenth session.

59. NAM, Algeria, Cuba and Pakistan had asserted that the Working Group had no mandate to discuss indicators, that the high-level task force had gone beyond its mandate by proposing indicators and that in no case could a matter outside the mandate of the Working Group be used as a condition for the fulfilment of the mandate given to it by the Human Rights Council. Pakistan and Indonesia had suggested that the issue of measurability be considered simultaneously with the second reading. NGOs expressed the view that the question of measurability would arise only in the implementation phase and that, given the subjective character of the right to development, indicators must be determined by the people themselves at the local and national levels and be based on their specific needs and requirements. A collective of NGOs suggested proceeding with the second reading with a parallel debate on indicators, using input from a pilot project that would seek to apply the proposed criteria and subcriteria, and from an expert group set up for the purpose.

60. NAM, Egypt and Sri Lanka had proposed an exchange of ideas on integration of the right to development in the post-2015 development agenda. South Africa had underlined the importance of supporting a right to development approach as opposed to the human rights-based approach to development, which focused on civil and political rights

61. EU, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States were of the view that the ongoing discussions on the post-2015 agenda should not be prejudged or the process duplicated, and that all human rights, not just the right to development, were crucial to the post-2015 development agenda. Algeria, Cuba, the Islamic Republic of Iran and Tunisia, as well as the Association of World Citizens, had argued that many Human Rights Council resolutions already contained explicit language on the process and that the Working Group's contributions, being more specific, would only complement the more general discussions and would be welcomed.

62. NAM had proposed that, while bearing in mind that completion of the first reading was the priority, a letter should be sent to relevant United Nations organizations and specialized agencies requesting them, when making their contributions, to relate their activities also to the post-2015 development agenda.

63. EU, Switzerland, the United Kingdom and the United States had argued that United Nations organizations and specialized agencies should be free to decide on the content of their contributions. If a specific request was to be made to them, then it should also include a request to express their views on indicators.

64. Switzerland had proposed as a compromise that, in the letter, United Nations agencies should be invited to feel free to respond to questions that might be posed, including on integrating the right to development in the post-2015 development agenda.

65. Indonesia, Pakistan and Sri Lanka had been of the view that political will was lacking to join together internationally to implement the Declaration on the Right to Development and that, therefore, it was important to adopt a systemic approach that would permit discussion on the international system, on the need for an enabling environment and on identification of obstacles at the international level.

66. The Indian Council of South America had proposed establishing a process whereby indigenous peoples could participate in the work of the Working Group on an equal basis, taking into account their special status as peoples entitled to the exercise of the right to self-determination. One NGO had proposed that a privileged place be accorded to the participation of young people in the work of the Working Group, given their importance in society and their special responsibility for the future of humanity. NGOs had called for the compilation of all the comments made during the review process on criteria and operational subcriteria.

C. Submissions of groups of States, States, regional groups and other stakeholders

67. The Human Rights Council, in its resolution 24/4, endorsed the recommendations adopted by the Working Group on the Right to Development at its fourteenth session, in which, *inter alia*, the Working Group requested OHCHR to make available on its website and to the Working Group at its fifteenth session, in the format of two conference room papers, all further submissions by Governments, groups of Governments and regional groups, as well as inputs by other stakeholders. The Chair-Rapporteur provided a summary of the submissions as follows.

68. In response to its letter dated 5 July 2013, the Secretariat received 4 submissions from groups of States (2 from NAM and 2 from EU), 33 from Member States, 10 from United Nations organizations, 4 from national human rights institutions (2 from the National Human Rights Commission of India and 1 each from the Independent Human Rights Commission of Afghanistan and the Advisory Council on Human Rights of Morocco), 1 from a United Nations treaty body (the Committee on Economic, Social and Cultural Rights), 4 joint submissions from NGOs (3 from Catholic-inspired NGOs and 1 from an indigenous peoples' organization) and 12 individual submissions from civil society organizations and academics. Those submissions are in addition to comments made during the past three sessions. All the submissions have been posted in their original versions on the OHCHR website and have also been compiled in documents A/HRC/WG.2/15/CRP.3 and 4.

69. The content and focus of the contributions varied, ranging from general statements to specific proposals. One submission expressed concern that the draft right to development criteria and operational subcriteria sought to redefine the right to development and were conceived of, with their focus on the national dimension, as a tool to monitor the actions of States. However, the main objective of the exercise should be the creation of the necessary basis for the elaboration of a legally binding instrument. The focus of the criteria must be on achieving the conditions for economic development and strengthening the ability of States to promote and protect all human rights. Underdevelopment was not an intrinsic property of one or several countries, but the result of colonization and looting. International responsibility and collective action should therefore focus on creating the conditions necessary for the full realization of the right to development.

70. Another submission recommended specific indicators and reformulation of a subcriterion to reflect the negative impact of unilateral coercive measures on development, and further indicators for measuring the elimination of sexual exploitation and human trafficking. One submission provided an overview of steps taken at the national level to ensure the realization of the right to development, steps taken in international cooperation and steps taken at the regional level, such as the drafting of a regional human development report focusing on the right to development.

71. A joint submission from civil society organizations emphasized the urgent need to fully implement the right to development to overcome structural obstacles at the international and national levels. The post-2015 development agenda should be aligned with the human rights-based approach and focus on the right to development. While indicators were necessary to monitor the implementation of the right to development, they should be determined after agreement had been reached on the criteria and subcriteria. Experts might be more competent and neutral in identifying indicators, while States should indicate specific national subparameters for responding to the needs of a specific population/country. The criteria and operational subcriteria should reflect all the articles of the Declaration on the Right to Development, including its preamble, as the principal source. The criteria and subcriteria must address structural imbalances and remove obstacles to the realization of an enabling international and national environment for implementing the right to development.

72. One contribution cautioned against further expanding the list of criteria and subcriteria. On attribute 2, "Participatory human rights processes," it suggested that the relevance of constitution-building processes in the consolidation of the rule of law, and the role of electoral participation in the strengthening of democracy should be emphasized, and the participation of women, youth and ethnic minorities in those processes, especially in the context of post-conflict reconstruction and peacebuilding, should be advocated. On attribute 3, "Social justice in development," it encouraged, all possible mutual feedback with the post-2015 development agenda, including on structural change and social covenants for equality. It called for specific attention to sustainable development and the equitable use of natural resources.

73. Another contribution emphasized the need for non-discrimination in development and the fair sharing of the benefits and burdens of development. It advocated a mixed economy as the most suited to create favourable conditions for development, and highlighted social safety nets, green technology, health-care systems and education as important elements for achieving development. Another submission shared information on experiences in promoting women's leadership and participation.

74. One submission pointed out that the draft right to development criteria and operational subcriteria did not clearly clarify the core elements and principles of the right to development and the responsibilities which the international community, especially developed countries, should assume to implement that right. It suggested revising the draft criteria and subcriteria to strike a balance between "human rights-based development" and "the right to development"; between "development as a human right" and "human rights as development"; and between international responsibility and domestic responsibility. The submission contained several concrete proposals for revising the draft subcriteria, formulating new subcriteria, and revising and/or proposing indicators. While underlining that further studies and new international legal instruments were needed, such as a convention on the right to development, the suggestion was made that guidelines should be elaborated for implementing the Declaration on the Right to Development. It was necessary to distinguish between the right to development and human rights-based development and human rights. It was pointed out that the right to development emphasized fair and equal opportunities for development among subjects at different stages of development, with the

aim of eliminating the gap between developed and developing countries, especially least developed countries. The need to focus also on good governance at the international level was underlined. Another submission provided information on the key role of women and made concrete proposals for fostering and promoting their role for development.

D. Review of progress in the implementation of the right to development, including consideration, revision and refinement of the right to development criteria and operational subcriteria

75. At its 2nd to 6th meetings, from 12 to 14 May, the Working Group considered and revised the draft operational right to development subcriteria listed in the annex to addendum 2 to the report of the high-level task force (A/HRC/15/WG.2/TF/2/Add.2) under attributes 2 "Participatory human rights processes" and 3 "Social justice in development", as well as proposals for additional subcriteria.

76. Throughout the consideration of the operational subcriteria, a few speakers introduced or sought to introduce the element of measurability, ranging from indicators to monitoring and evaluation of the implementation of human rights. Raising concerns, reservations and objections, the overwhelming majority of developing country Member States maintained that indicators, whether so named or under the guise of measurability, were clearly outside the mandate of the Working Group and had also been outside the scope of the mandate of the high-level task force on the implementation of the right to development. They contended that indicators did not make a positive contribution to the Working Group's objective of elaborating a comprehensive and coherent set of standards for the implementation of the right to development, in accordance with the resolutions of the Human Rights Council.

77. A broad range of perspectives emerged in the consideration of individual subcriteria, and new subcriteria were also proposed. In the discussion of international conventions, some speakers emphasized the implementation of all instruments relating to human rights, the environment and labour, focusing on the disadvantaged and marginalized. Others raised questions about the source of the notions of disadvantaged and marginalized in previous intergovernmental agreements. On national legal protection of human rights, some speakers advocated the inclusion of constitutional and legislative guarantees, and proposed that the particular role of national human rights institutions set up in accordance with the Paris Principles should be highlighted, while others preferred measures to improve the global partnership and achieve the internationally agreed development goals, including the Millennium Development Goals. For a few Member States, the right to development remains an ambiguous concept. For the majority, it is a human right that must be reflected in all discussions on human rights.

78. Some speakers favoured the human rights-based approach to development for national development strategies, while others opposed it on the basis that it did not take account of different levels of development. Some suggested that the right to development approach should replace the human rights-based approach. One NGO suggested revising the draft criteria and subcriteria to strike a balance between "human rights-based development" and "the right to development"; between "development as a human right" and "human rights as development"; and between international responsibility and domestic responsibility.

79. The numerous, miscellaneous and detailed proposals on existing and new subcriteria included suggestions on human rights education, consultation with civil society, access to data and information, especially on climate and the environment, information management systems for responding to natural disasters, good governance, the rule of law and combating

corruption, decent work, access to good-quality employment, decent housing, preventing violence against women and girls, combating child, early and forced marriage, the elimination of sexual exploitation and human trafficking, the rights of migrant workers, the positive role of migrants in the globalization process, the elimination of all forms of racism, racial discrimination, xenophobia and related intolerance, colonialism and colonization, the right to self-determination of peoples which remain under colonial occupation, foreign domination and occupation, common but differentiated responsibilities, global good governance, international cooperation (North-South, South-South and triangular), the reform of international institutions, avoidance of unilateral coercive measures; strengthening national equitable land redistribution and rural development policies for historically disadvantaged peoples, including those affected by apartheid and colonialism, sovereignty over all natural wealth and resources, global financial architecture, the removal of inequities in global decision-making in international institutions, the removal of asymmetries in international trade, the elimination of tax havens, the elimination of debt, the root causes of climate change, development of a new model of international cooperation based on solidarity, the right to international solidarity, the right to peace and a legally binding framework for the right to development.

80. After concluding its consideration of the operational subcriteria, the Working Group considered agenda item 4 (d), "Other matters". NAM acknowledged that although progress had been made in completing the first reading, much remained to be done to overcome challenges and to narrow down divergences in a constructive and non-distractive way, which required a number of measures to enhance the effectiveness and efficiency of the Working Group. Those measures included: extending the Working Group's meeting time to two separate weeks annually; development by the Chair-Rapporteur of a road map; scaling up of the Chair-Rapporteur's informal and formal contacts; enhancing the mainstreaming of the right to development in United Nations agencies and other international organizations, as mandated by pertinent resolutions of the Human Rights Council and the United Nations General Assembly; and limiting the participation of NGOs to those in consultative status with the Economic and Social Council. NAM argued that additional meeting time was needed to expedite the work of the Working Group. Nothing prevented the Working Group from making a recommendation to that effect to the Human Rights Council for endorsement at its twenty-seventh session. NAM further explained that it was not against indicators, but was of the view that they should not be copied from the task force report and pasted under subcriteria. India recognized that some useful contributions had been made during the first reading, but expressed its reservations on including new issues like the right to peace, self-determination, and business and human rights. It supported the proposals of NAM and added that two annual meetings of 10 days would be required. India also observed that the Universal Declaration of Human Rights should not be renegotiated through the work on the right to development. Pakistan expressed regret that the realization of the right to development was lagging far behind and continued to face obstacles in moving forward. It expressed the need to commence the second reading and to find alternatives for consensus building.

81. EU, supported by the United States and Switzerland, explained that it was not prepared to begin a second reading before resolving some critical divergences, such as on measurability, the road map, additional meeting time and the participation of all non-governmental organizations whether or not they were in consultative status with the Economic and Social Council, in order to ensure that the second reading would be productive. EU underscored that the participation of United Nations agencies and international organizations, with only 3 participating at the session of the 11 that had confirmed that they would participate, should also be addressed. EU, the United States and Switzerland were of the view that the issue of meeting time should be resolved at the Human Rights Council session in September 2014. On the participation of NGOs, the

Chair-Rapporteur called on the Secretariat to explain the applicable rules. It was consequently clarified that unless otherwise laid down in the resolutions establishing subsidiary bodies of the Human Rights Council, such as the Social Forum, participation in them was limited to NGOs in consultative status with the Economic and Social Council. However, the Working Group could consider and agree to expanding the participation of NGOs to include those not in consultative status with the Economic and Social Council, in which case it should make a recommendation to that effect for endorsement by the Human Rights Council.

IV. Conclusions and recommendations

82. At the final meeting of its fifteenth session, on 16 May 2014, the Working Group on the Right to Development adopted, by consensus, its conclusions and recommendations, in accordance with its mandate established by Commission on Human Rights resolution 1998/72.

A. Conclusions

83. The Working Group took note of documents A/HRC/WG.2/15/CRP.3 and 4 containing detailed views and comments submitted by Governments, groups of Governments, regional groups and other relevant stakeholders in fulfilment of the conclusions and recommendations agreed at its fourteenth session.

84. The Working Group expressed appreciation to all those who contributed with their submissions and inputs.

85. The Working Group welcomed the presentation made by the Chair-Rapporteur of the Working Group and commended her for the able stewardship in guiding the deliberations of the Working Group.

86. The Working Group welcomed the presence and participation and took note of the opening remarks delivered by the High Commissioner and the participation of OHCHR, which attested to her commitment and that of her Office to promoting and protecting the realization of the right to development and to enhancing support from relevant bodies of the United Nations system for that purpose, consistent with General Assembly resolution 48/141.

87. The Working Group took note of the continuation of the process of considering, revising and refining the draft criteria and the corresponding operational subcriteria contained in document A/HRC/15/WG.2/TF/2/Add.2, and welcomed the completion of the first reading of the draft criteria and operational subcriteria.

88. The Working Group will further consider, revise and refine the aforementioned draft criteria and corresponding operational subcriteria, as mandated by the Human Rights Council in its resolution 24/4.

89. The Working Group regretted the low attendance of invited experts from international organizations and, in that context, urged their broader engagement and re-emphasized the importance of engaging further the relevant United Nations agencies, funds and programmes and institutions, as well as other multilateral institutions and forums, international organizations and other relevant stakeholders.

B. Recommendations

90. The Working Group recommended the following:

(a) To continue to accomplish its mandate including, in particular, to consider, revise and refine the draft right to development criteria and corresponding operational subcriteria;

(b) To request the Chair-Rapporteur to further her efforts to improve the effectiveness and efficiency of the Working Group, with a view to accomplishing its mandate, including through drafting a framework for consideration at the sixteenth session of the Working Group, in consultation with regional and political groups;

(c) To request OHCHR to make available on its website and to the Working Group two conference room papers reflecting comments and views submitted during the session by Governments, groups of Governments and regional groups, as well as by other relevant stakeholders, respectively;

(d) To also request OHCHR to make available on its website and to the next session of the Working Group, in the format of two conference room papers, all further submissions by Governments, groups of Governments and regional groups, as well as inputs by other stakeholders;

(e) To invite the Chair-Rapporteur to hold informal consultations with Governments, groups of Governments, regional groups and relevant stakeholders in preparation for the sixteenth session of the Working Group;

(f) To invite the High Commissioner and to request the Chair-Rapporteur, with the support of OHCHR, to intensify their efforts towards further engagement and active participation of all relevant stakeholders, in particular key relevant international organizations and civil society organizations, in the work of the Working Group, consistent with paragraph 89 above.

Annex I**Agenda**

1. Opening of the meeting.
2. Election of the Chair-Rapporteur.
3. Adoption of the agenda and programme of work.
4. Review of progress in the implementation of the right to development, including consideration, revision and refinement of the right to development criteria and operational subcriteria (A/HRC/15/WG.2/TF/2/Add.2).
5. Adoption of conclusions and recommendations.
6. Adoption of the report.

Annex II

[English only]

List of attendance

Members of the Human Rights Council

Algeria, Argentina, Brazil, Chile, China, Côte d'Ivoire, Cuba, Czech Republic, Ethiopia, France, Germany, India, Indonesia, Ireland, Italy, Japan, Mexico, Morocco, Namibia, Pakistan, Philippines, Russian Federation, Saudi Arabia, South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam

States Members of the United Nations

Australia, Bahrain, Bolivia (Plurinational State of), Brunei Darussalam, Bulgaria, Colombia, Croatia, Democratic People's Republic of Korea, Ecuador, Egypt, Ghana, Greece, Guatemala, Iran (Islamic Republic of), Iraq, Latvia, Libya, Malaysia, Mauritius, Paraguay, Rwanda, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Uruguay

Non-member States represented by an observer

Holy See, State of Palestine

United Nations funds, programmes, specialized agencies and related organizations

International Telecommunication Union, United Nations Children's Fund, United Nations Conference on Trade and Development, United Nations Research Institute for Social Development, World Meteorological Organization

Intergovernmental organizations

African Union, European Union, Organization of the Islamic Conference

Non-governmental organizations in consultative status with the Economic and Social Council

General

China NGO Network for International Exchange (CNIE), CIVICUS – World Alliance for Citizen Participation, International Youth, New Humanity, Student Movement for the United Nations

Special

Association Points-Coeur, Associazione Comunità Papa Giovanni XXIII, Collectif des Femmes Africaines du Hainaut , Dominicans for Justice and Peace - Order of Preachers, European Union of Women, International Organization for the Right to Education and Freedom of Education (OIDEL), Myochikai (Arigatou Foundation)

Roster

Friedrich Ebert Stiftung



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Human Rights Council

Twenty-seventh session

Agenda item 3

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

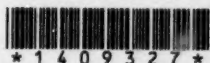
Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte

Summary

The present report, the first annual report to be submitted by a mandate holder, was prepared in accordance with Human Rights Council resolution 24/20, in which the Council decided to establish the mandate of Independent Expert on the enjoyment of all human rights by older persons.

In the report, the Independent Expert describes the activities undertaken since taking office on 2 June 2014 and her views about the foundations and context of the mandate, as well as some preliminary considerations that will inform her work during the mandate.

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I. Introduction

1. The present report is submitted by the first Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, to the Human Rights Council pursuant to its resolution 24/20 of 27 September 2013. In the report, the Independent Expert describes the activities undertaken from 2 June to 28 July 2014, and provides her preliminary considerations concerning the foundation and context of the mandate, as well as some considerations that will inform her work during the mandate.

II. Mandate-related activities

2. Since assuming her functions on 2 June 2014, the Independent Expert has engaged in consultations with a large number of experts and civil society organizations, exchanging views about priorities and strategies for fulfilling the mandate, including HelpAge and the Centro Latinoamericano de Políticas Económicas y Sociales of the Pontifical Catholic University of Chile.

3. On 2 and 3 June 2014, the Independent Expert addressed the International Association of Universities of the elderly in Toulouse, France. She furthermore accepted an invitation, on 10 July 2014, to share her views and expertise on pension reform in Chile with the Presidential Commission for the Study of Social Security Reform.

4. As part of the mandate, the Independent Expert was requested to work in close coordination, while avoiding unnecessary duplication, with the Open-ended Working Group on Ageing. At the time of submission, the Independent Expert had confirmed her participation in the upcoming fifth session of the Working Group, scheduled for 30 July to 1 August 2014 in New York. The Working Group will, *inter alia*, discuss measures to strengthen the promotion and protection of the rights of older persons, which are currently not addressed sufficiently, in particular in the areas of care for older persons, violence and abuse against older persons, and legal and financial issues in relation to the planning for end-of-life care. The Independent Expert will moderate a panel on recent developments. The Working Group will also hold a dialogue on how to strengthen the rights of older persons through enhanced implementation of the Madrid International Plan of Action on Ageing, and discuss the post-2015 development agenda and older persons.

5. Pursuant to Human Rights Council resolution 24/25, the 2014 Social Forum focused on the rights of older persons, including best practices in this regard. While the Forum, which was held from 1 to 3 April 2014, was held before the appointment of the Independent Expert, the importance of the mandate and the future activities of the mandate holder permeated the deliberations. The Office of the United Nations High Commissioner for Human Rights (OHCHR) participated in a number of panel discussions, in particular in the discussion on the theme "the universal human rights system: new opportunities for participation", at which it informed the participants that the Independent Expert could help to advance international standards on older persons, and would aim to (a) assess existing laws; (b) investigate the views of stakeholders; and (c) take a gender/disability perspective.

III. Foundations of the mandate

A. Background

6. The world is undergoing an unprecedented demographic transformation towards an ageing population. Estimates indicate that the number of elderly persons will increase from 600 million to 1.2 billion by 2025. By 2050, this age group is expected to reach 2 billion, approximately equivalent to the global population youth.

7. In the light of these projections, several international organizations have stressed the need to address the significant challenges posed by global ageing. In this context, the different situations imposed by the heterogeneity of ageing and specific problems in different cultures of the world should be borne in mind, including those associated with healthy, ill, terminal, non-disabled and elderly persons with disabilities, whether physical or cognitive, as well as the care needs and ethical issues posed for each of these groups. In addition, this sociodemographic scenario demands the protection of the rights of older persons at the national, regional and global levels, the development of public institutions, the visibility of the issue of old age and ageing, the inclusion of seniors, their health care, and strengthening social services, among others.

B. Scope of the mandate

8. In its resolution 24/20, the Human Rights Council established the mandate of the Independent Expert on the enjoyment of all human rights by older persons, to assess the implementation of existing international instruments with regard to older persons while identifying both best practices in the implementation of existing law related to the promotion and protection of the rights of older persons and gaps in the implementation of existing law.

9. As part of the mandate, the Independent Expert has also been tasked to assess the human rights implications of the implementation of the Madrid International Plan of Action on Ageing.

10. Operationally, in its resolution 24/20, the Human Rights Council specified that the Independent Expert should discharge the mandate by taking into account the views of stakeholders, including States, relevant regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions, and by integrating a gender and disability perspective into her work, and to pay particular attention to older women, persons with disabilities, persons of African descent, individuals belonging to indigenous peoples, persons belonging to national or ethnic, religious and linguistic minorities, rural persons, persons living on the streets, and refugees, among other groups.

11. The Council also requested the Independent Expert to raise awareness of the challenges faced in the realization of all human rights by older persons, and to ensure that older persons receive information about those rights, as well as to work in cooperation with States in order to foster the implementation of measures that contribute to the promotion and protection of the rights of older persons. The Council also called upon the Independent Expert to work in close coordination, while avoiding unnecessary duplication, with the Open-ended Working Group on Ageing, other special procedures and subsidiary organs of the Council, relevant United Nations bodies and the treaty bodies.

12. The Human Rights Council further requested the Independent Expert to report annually to the Council with a view to presenting a comprehensive report at its thirty-third session.

C. Legislative context

13. In 2010, the independent expert on the question of human rights and extreme poverty dedicated her annual report to the role that social protection systems play in reducing extreme poverty and in contributing to the realization of human rights of older persons.¹

14. In its resolution 15/22, the Human Rights Council requested the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to prepare a thematic study on the realization of the right to health of older persons. On the basis of that study,² a panel discussion was held by the Council at its eighteenth session, in September 2011, on the right to health of older persons, focusing on increasing challenges that older persons face and on an opportunity to identify good practices and possible measures.

15. Also in 2011, OHCHR contributed to the report of the Secretary-General submitted to the General Assembly on the follow-up to the Second World Assembly on Ageing.³ A questionnaire was sent to States and stakeholders soliciting observations and information on existing legislation, policies and programmes related to various human rights issues related to older persons. The report contains an overview of some of the challenges faced by older persons in the enjoyment of their rights and outlines examples of government responses to those challenges, including through an illustrative collection of legislation, policies and programmes. It also underlines four critical human rights issues for older persons: discrimination; poverty; lack of special measures, services and facilities; and violence and abuse.

16. In 2012, in her annual report to the Economic and Social Council, the High Commissioner focused on the human rights of older persons.⁴ In the report, she provided an overview of existing international instruments and the gaps in the international protection regime, particularly focusing on areas such as age discrimination, legal capacity and equal recognition before the law, long-term care, violence and abuse, access to productive resources, work and food, social protection and the right to social security, the right to health and end-of-life care, disabilities, older persons in prison, and access to justice. The High Commissioner recommended, *inter alia*, the creation of a new special procedures mandate.

17. Pursuant to Human Rights Council resolution 21/23, OHCHR organized a public consultation on the promotion and protection of the human rights of older persons in April 2013, in order to receive information and to share good practices on the matter. A summary report was prepared thereon and submitted to the Human Rights Council at its twenty-fourth session.⁵ The conclusion reached at the consultation was that, while most international human rights instruments were applicable to all age groups, including older persons, a number of human rights issues particularly relevant to older persons had not been given sufficient attention either in the wording of existing human rights instruments or in the practice of human rights bodies and mechanisms.

18. The Human Rights Council subsequently adopted resolution 24/20, in September 2013, thereby establishing the mandate of the Independent Expert.

¹ See A/HRC/14/31.

² A/HRC/18/37.

³ A/67/188.

⁴ E/2012/51.

⁵ A/HRC/24/25.

D. Global context

19. In 2002, the Second World Assembly on Ageing adopted the Madrid International Plan of Action on Ageing to respond to the opportunities and challenges of population ageing in the twenty-first century. The Plan of Action was preceded by the Vienna International Plan of Action on Ageing, which was adopted at the First World Assembly on Ageing, held in Vienna in 1982 and which was subsequently endorsed by the General Assembly.

20. The Madrid International Plan of Action on Ageing requires States to take measures to address ageing in order to achieve a society for all ages. It also calls for the mainstreaming of ageing into national and global development agendas, and contains recommendations for action focused on three priority areas, namely development, health and well-being, and enabling and supportive environments, which are divided into specific issues, objectives and actions.

21. The Independent Expert has been mandated to assess the human rights implications of its implementation. In this context, she notes that the Secretary-General, in his report on further Implementation of the Madrid International Plan of Action on Ageing, outlined impediments to its implementation, including the lack of financial and human resources, lack of political focus and will, and differing national and regional perceptions of old age issues, which translate into different policy approaches, as well as emerging views and approaches.⁶

22. In its resolution 65/182 on the follow-up to the Second World Assembly on Ageing, the General Assembly established the Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons by considering the existing international framework of the human rights of older persons and identifying possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.

23. As mentioned above, the Independent Expert will work in close coordination with the Open-ended Working Group, while avoiding unnecessary duplication. In this regard, it is important to note the difference in the mandates of the Independent Expert and the Open-ended Working Group. While the latter is mandated to consider the existing international framework of the human rights of older persons to identify possible gaps and to assess how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures, the Independent Expert is entrusted to assess the implementation of the existing law and to identify best practices and gaps. The comprehensive report that the Independent Expert has been requested to prepare for the Human Rights Council at its thirty-third session will be brought to the attention of the Working Group, in accordance with Council resolution 24/20.

E. International standards and initiatives

24. At the international level, there are policies, standards and mechanisms aimed at protecting and promoting the rights of older persons, either in the form of generic or specific provisions, especially in the field of international labour law, as well as international and human rights law. This leads to a context of regulatory dispersion (rather than "legal gap" or "lack of regulation"), whereby the rights of older persons lack systematic protection.

⁶ E/CN.5/2014/4.

25. Although there is no specific international human rights instrument devoted to older persons, most human rights treaties contain implicit obligations towards them. Explicit references to age as a ground of discrimination, though rare, can be found in more recent human rights treaties, such as article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Convention on the Rights of Persons with Disabilities contains various references to older persons (in article 13.1, on access to justice, article 16 on age-sensitive protection services, article 25 (b) on health, and article 28.2 (b) on an adequate standard of living and social protection). The Convention on the Elimination of All Forms of Discrimination against Women includes a reference to old age in relation to discrimination in the enjoyment of the right to social security (article 11.1 (e)).

26. The treaty bodies have considered the application of their respective treaties to older persons. The Committee on Economic, Social and Cultural Rights issued general comment No. 6 on the economic, social and cultural rights of older persons, while the Committee on the Elimination of Discrimination against Women made general recommendation No. 27 on the issue of older women and the protection of their human rights. The Committee on Economic, Social and Cultural Rights also referred to the rights of older persons in its general comment No. 19 on the right to social security (considering old age one of the branches to be covered by social security systems), and general comment No. 20, on non-discrimination in economic, social and cultural rights (which prohibits age as a ground for discrimination).

27. A number of regional human rights treaties also contain provisions on the rights of older people, namely article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador); articles 46 and 47 of the Andean Charter for the Promotion and Protection of Human Rights; article 25 of the Charter of Fundamental Rights of the European Union; article 12 of the revised European Social Charter; and article 18 of the African Charter on Human and Peoples' Rights.

28. At the international level, a number of non-binding instruments recognize older persons as a group, such as the Madrid International Plan of Action on Ageing of 2002 and the Vienna International Plan of Action on Ageing of 1982, as well as the United Nations Principles for Older Persons, adopted by the General Assembly in its resolution 46/91. In the latter text, the Assembly encouraged Governments to incorporate the 18 principles into their national programmes in order to promote the independence, participation, care, self-fulfilment and dignity of older persons.

29. The International Labour Organization has developed a number of recommendations addressing the situation of older workers, including Invalidity, Old-Age and Survivor's Benefits Recommendation No. 131 (1967), Older Workers Recommendation No. 162 (1980) and Termination of Employment Recommendation No. 166 (1982).

30. A comprehensive overview of existing international instruments relating to the human rights of older persons can be found in the compilation of the Open-ended Working Group on Ageing of 11 July 2013, prepared by OHCHR,⁷ and in the OHCHR analytical outcome paper on normative standards in international human rights law in relation to older persons of August 2012.

31. The lack of a comprehensive and integrated international legal instrument to promote and protect the rights and dignity of the elderly has significant practical implications, given that:

⁷ Available at <http://social.un.org/ageing-working-group/documents/fourth/compilation.pdf>.

(a) Existing regulations do not cohere, let alone conceptualize, regulatory principles to guide public action and policies of Governments;

(b) General human rights standards do not consider the recognition of third-generation specific rights in favour of elderly adults;

(c) It is difficult to clarify the obligations of States with respect to older persons;

(d) Procedures for monitoring human rights treaties generally ignore older persons;

(e) Current instruments do not make the issues of ageing visible enough, which precludes the education of the population and with it, the effective integration of the elderly.

32. In this sense, there is a difference in the historical treatment of the elderly by the international human rights system in relation to other vulnerable populations. For boys, girls and adolescents, women, indigenous communities and persons with disabilities, the binding instrument have been driven by the international legislator in a vertically descending order; in the case of the elderly, however, it seems that the awareness of the need for international regulation and a regulatory framework base has rather been ascending, from the motivation of the bases or regional human rights systems, which are an entirely new concept in their identity and development.

33. Moreover, as noted by the General Assembly in its resolution 67/139, the efforts of Governments, relevant bodies of the United Nations system and civil society, including non-governmental organizations and the private sector, to enhance cooperation and integration and increase awareness of issues of the elderly since the adoption of the Plans of Action of Vienna (1982) and Madrid (2002) have not been sufficient to promote opportunities for elderly persons or their full and effective participation in economic, social, cultural and political life.

IV. Preliminary considerations of the Independent Expert

34. To fulfil the mandate entrusted to her, the Independent Expert has chosen a comprehensive approach to ageing, encompassing work in the international legal and policy areas. As a precondition to assessing implementation gaps and best practices, the Independent Expert contemplates outlining the specific rights of older persons, whereby she relies on the traditional classification of human rights.

35. The civil rights of older persons include the right to equality and non-discrimination on grounds of age, which requires adopting special measures of positive reinforcement to promote awareness. Deriving from the rights to life and to a dignified death is the prohibition of imprisonment for older persons and of death penalty for the elderly. Moreover, the rights to physical, mental and emotional integrity require the implementation of legislative measures to ensure proper treatment for older persons and penalties for physical, psychological and patrimonial abuse and neglect.

36. The right to legal personality and capacity involves the recognition of autonomy; the ability to exercise rights and civil obligations; the need to grant the necessary authorizations to act on their behalf; and to distinguish between decision-making capacity and competence in health, and that only a court order may limit their legal capacity.

37. With regard to elderly women, in addition to the elimination of all forms of discrimination on grounds of age, there is a need to ensure the full recognition of and respect for their rights, including the prevention of all forms of violence, the abolition of widowhood rites and other harmful traditional practices that may affect the integrity of

elderly women, the protection of elderly women living in rural areas, social security, and the protection of property and possession rights of widows.

38. The right to proper (non-violent) treatment, the protection of the extended family systems, and gender and generational equality are central aspects to the protection of the rights of indigenous elderly persons.

39. The political rights of older persons include the right to participate in the social, cultural and political life of the community, which entails the right to actively participate in the formulation and implementation of legislative measures and public policies that directly affect their rights, including policies on ageing, social development and strategies for poverty reduction, as well as the right to association and the right to receive government support through legal or economic measures. There is also a need to promote intergenerational volunteering.

40. The social rights of older persons can be classified into three groups, allowing for a system of integrated social protection in order to promote quality of life and well-being.

41. First, the right to income security contemplates the inclusion of minimum standards for the areas covered by the right to an adequate standard of living; fundamental principles that should guide social policies with an age and welfare perspective in the context of ageing. It also involves prescribing the right to benefit from social security and other forms of social protection during old age and in the event of retirement, widowhood, disability or other situations of involuntary loss of livelihood, as well as equal conditions of retirement for men and women and the prohibition that government laws reduce retirement benefits.

42. Second, the right to improve functional health entails the exercise of the right to health and the right to the highest attainable standard of physical and mental health, without discrimination and with full respect for the dignity and autonomy of older persons. It requires considering preventive and restorative health (primary care and rehabilitation services); the right to provide informed and free consent prior to any medical treatment; sheltered accommodation; the promotion of preferential access to medicines in the case of age-related diseases; and financial and technical support for home care and alternative care in the families, as well as palliative care for terminal patients.

43. Third, Governments should furthermore promote active policies to eradicate illiteracy (with emphasis on women), and to facilitate the active participation of elderly persons in cultural activities and education programmes that allow them to pass on their knowledge, culture and spiritual values as part of the right of older persons to a continuous and multi-specialty education in public and private institutions from the standpoint of lifelong learning.

44. Another important factor regarding the independence and health of the elderly population, in particular during crisis situations, emergency evacuations or displacement arising from development, is the right to housing and to a healthy environment. Priority is assumed in the allocation of housing or land to older persons in the above-mentioned situations, and entails the right to live in a safe and healthy environment, with access to water, clean air and a pollution-free environment, and to remain in their own home for as long as possible, according to their needs and will.

45. The right to work includes the right of older persons to work and have access to income-generating activities; equal treatment and opportunities in salaries, working conditions, vocational guidance and training, and job placement; and freedom of association without discrimination on grounds of age. It also requires the establishment of employment policies that promote the participation or return to the labour market of elderly workers, as well as legal reforms and economic incentives that allow the employment of older persons after retirement age, according to their ability, experience and preferences,

including such measures as the gradual reduction of working hours, part-time work and flexible schedules, and the dissemination of information on the rights and benefits of retirement.

46. With regard to procedural guarantees for older persons, access to justice is central, as its absence results in various forms of discrimination and everyday obstacles. In particular, exceptional care must be taken when responding to legal complaints relating to the provision of benefits to older persons or in the event of widowhood.

V. Conclusion

47. The Independent Expert aims to respond to the expectations of numerous individuals and organizations with regard to her work on the human rights of older persons, as outlined by the Human Rights Council in its resolution 24/20. To that end, she looks forward to engaging in constructive and fruitful cooperation with diverse stakeholders in all regions. She emphasizes her desire for constructive engagement with the States Members of the United Nations, and reiterates the importance of an inclusive and all-encompassing approach in the discharge of her mandate. She particularly notes the central role of non-governmental organizations, including in providing her with information and engaging with and assisting her as she fulfils her mandate.



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**Promotion and protection of all human rights,
civil, political, economic, social and cultural rights,
including the right to development**

Report of the Working Group on Arbitrary Detention*

**A compilation of national, regional and international laws, regulations
and practices on the right to challenge the lawfulness of detention
before court**

Chair-Rapporteur: Mads Andenas

Summary

The present report, submitted pursuant to Human Rights Council resolution 20/16, provides an overview of the national, regional and international laws, regulations and practices on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

In that regard, the Working Group on Arbitrary Detention sought, by means of a questionnaire, the views of States, relevant United Nations agencies, intergovernmental organizations, treaty bodies, particularly the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other relevant stakeholders.

The report is a compilation of the information submitted by stakeholders and is the result of an independent review of relevant international and regional legal frameworks. This exercise was undertaken as a first step in the Working Group's preparation of draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before court.

* The annex to the present report is circulated in the language of submission only.

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I. Introduction

1. The International Court of Justice has stated that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”.¹ In 1991, the Commission on Human Rights established the Working Group on Arbitrary Detention to investigate detention imposed arbitrarily and inconsistently with international standards in the Universal Declaration of Human Rights and legal instruments accepted by the States concerned (E/CN.4/RES/1991/42). The Working Group is the only Charter-based (or non-treaty-based) mechanism whose mandate expressly provides for consideration of individual complaints. Its actions are based on the right of petition for individuals anywhere in the world. The opinions of the Working Group are reported to the Human Rights Council, which urges Member States to cooperate and comply with the Working Group and its opinions, and where States make statements about international and domestic law, and human rights obligations in conventions and customary international law, and their own and other States’ compliance with these.
2. The Human Rights Council, in its resolution 20/16, encourages all States to “respect and promote the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful, in accordance with their international obligations” (A/HRC/RES/20/16, para. 6 (d)). The Council requested the Working Group to prepare, and to present to it before the end of 2015, draft basic principles and guidelines on remedies and procedures to assist Member States with their compliance (*ibid.*, para. 10).
3. The Working Group was directed to seek the views of States, United Nations agencies, intergovernmental organizations, treaty bodies, particularly the Human Rights Committee, other special procedures, national human rights institutions, non-governmental organizations and other stakeholders. In 2013, the Working Group distributed a questionnaire on the treatment of the right to challenge the lawfulness of detention before court in the respective legal frameworks. It received responses from 44 States, 20 national human rights institutions, eight non-governmental organizations, five special procedures mandate holders, three regional entities and one of the treaty bodies.
4. The report is divided into three sections. The first section sets out the international human rights treaties, standards, and reports and jurisprudence of international mechanisms on the right to challenge the lawfulness of detention before court. The second section sets out the regional legal framework, including treaties, standards and jurisprudence of regional mechanisms relating to the right to challenge the lawfulness of detention before court. The third section, which constitutes the annex to the report, presents, in tabular format, national legal provisions relating to the right to a court review, as submitted by Member States to the Working Group.
5. The report does not attempt to be exhaustive in its citation of relevant legal instruments and jurisprudence but rather to show the general practice accepted as law in the international practice, representations by states and universal adoption of legal guarantees for the procedural right of anyone deprived of his or her liberty to challenge the lawfulness of his or her detention.

¹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports 1980, p. 42.

II. International legal framework

6. Although article 9 of the Universal Declaration of Human Rights establishes that “no one shall be subjected to arbitrary arrest, detention or exile”, persons deprived of their liberty are frequently unable to benefit from legal resources and guarantees that they are entitled to for the conduct of their defence as required by law in any judicial system and by applicable international human rights instruments (A/HRC/10/21, para. 45). A defining element of the deprivation of liberty is the inability of those who are in detention to defend and protect themselves, as their daily life is largely dependent on the decisions taken by the staff at the detention facilities (*ibid.*, para. 46). In such an environment, persons deprived of their liberty not only have difficulties in verifying the lawfulness of their detention, but also find themselves subjected to a lack of an effective control of their other rights (*ibid.*, para. 47). Nonetheless, the right to bring such proceedings before court is well enshrined in treaty law and customary international law and constitutes *jus cogens*, as observed by the Working Group in its deliberation No. 9 (2013) concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44).

A. Uniform adoption of the right to challenge the lawfulness of detention before court

7. The right to challenge the lawfulness of detention is set out in a number of the core international human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Rights of the Child, the Convention relating to the Status of Refugees (of 1951) and the Protocol relating to the Status of Refugees (of 1967), the International Convention on the Protection the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities.

8. In addition, there are several non-binding international human rights instruments including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention. They provide valuable guidance in interpreting and implementing the requirements of the core human rights treaties and customary international law and are often relied upon by special procedures and treaty bodies in their work.

9. Other international human rights mechanisms than the Working Group on Arbitrary Detention have clarified the scope and content of the right to challenge the lawfulness of detention before court. Treaty bodies, in particular the Human Rights Committee, the Committee Against Torture, the Committee on Enforced Disappearances, the Committee on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of Persons with Disabilities have all addressed this right in their concluding observations, individual communications or general comments. The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has addressed the right in its country visit reports, annual reports and statements. Observations on the exercise of the right have also featured in the annual, country visit or joint reports of several special procedures mandate holders, including the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or

punishment, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and the Special Rapporteur on the human rights of migrants.

10. The right to challenge the lawfulness of detention before court and to a remedy follow from the combined reading of articles 8 and 9 of the Universal Declaration of Human Rights, whereby “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” and “no one shall be subjected to arbitrary arrest, detention or exile”. A comprehensive articulation of that right is found in article 9, paragraph 4, of the International Covenant on Civil and Political Rights, which states that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. Where persons deprived of liberty are not able to exercise this right, such as in cases of suspected enforced disappearance, the International Convention for the Protection of All Persons from Enforced Disappearance, in article 17, paragraph 2 (f), obligates State parties to “guarantee that ... any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation of liberty is not lawful”.

11. Principles 4, 11 and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment make a significant contribution. Principle 4 states that “any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority”. In respect to the prescribed mechanism for such proceedings, principle 11 states: “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. 2. [...] 3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.” The accessibility of such proceedings is set out in principle 32: “1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful. 2. The proceedings ... shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.”

12. The Working Group on Arbitrary Detention and the Human Rights Committee have delivered extensive guidance on the scope and content of this right. The Committee against Torture, the Subcommittee on Prevention of Torture and the Working Group on Enforced or Involuntary Disappearances have highlighted the importance of the procedural guarantee in their general comments, public statements, and country visit or annual reports.

13. The Working Group on Arbitrary Detention has consistently maintained that the right to challenge the lawfulness of detention before court is a self-standing human right, the absence of which constitutes a human rights violation *per se* (A/HRC/19/57, para. 61). The right to challenge the lawfulness of detention is frequently denied in circumstances where a detainee has never been formally charged or brought before a judge, has been held incommunicado or in solitary confinement, or has been denied an effective possibility or remedy to challenge his or her detention (Working Group opinions 33/2012 and 38/2012). The obstacles observed by the Working Group in mounting such a challenge include the

inability to access legal counsel or any source of information on commencing the procedure, the high cost of filing an application, lengthy court reviews, the inability to access evidence, the inability to appear before the court, and prolonged custody (A/HRC/19/57, para. 63). Violation of procedural guarantees often occurs in administrative detention and in rehabilitation centres (Working Group opinions 19/2012 and 22/2012). The detainee may have been ordered to be released following a successful challenge, yet remains in detention (see, for example, Working Group opinions 08/2011 and 14/2011). Where due process rights are denied, a State cannot rely on the excuse of lack of administrative capacity (Working Group opinions 21/2004 and 46/2006).

14. The Human Rights Committee has interpreted the content and scope of the right to challenge the lawfulness of detention in its general comment no. 8 (1982) on article 9 (right to liberty and security of persons) and in its jurisprudence. The objective of the procedural right is release from ongoing unlawful detention. "Unlawful detention" includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the International Covenant on Civil and Political Rights.² Unlawful detention may have been lawful at its inception but has become unlawful, because the individual has completed a sentence of imprisonment, or because the circumstances that justify the detention have changed.³

15. The Human Rights Committee has clarified the universal application of the right to challenge the lawfulness of detention before court, which extends to all situations of deprivation of liberty, including detention for the purposes of criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition, wholly groundless arrests, house arrest, solitary confinement, administrative detention, detention for vagrancy or drug addiction, detention of children for educational purposes, and other forms of administrative detention.⁴ No category of detainees may be denied taking such proceedings.⁵

16. The right to challenge the lawfulness of detention before court applies from the moment of arrest, and there should be no substantial waiting before bringing a first challenge.⁶ Proceedings may be commenced by either the detainee or his or her representative, and do not require an automatic initiation of review by the authorities

² Communications Nos. 1255/2004 et al., *Shams et al. v. Australia*, para. 7.3; 1460/2006, *Yklymova v. Turkmenistan*, para. 7.4 and 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6.

³ Communication No. 1090/2002, *Rameka v. New Zealand*, paras. 7.3 and 7.4.

⁴ Communications Nos. 248/1987, *Campbell v. Jamaica*, para. 6.4 (criminal proceeding); 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2 (military detention); 1051/2002, *Ahani v. Canada*, para. 10.2 (counter-terrorism); 1061/2002, *Fijalkowska v. Poland*, para. 8.4 (involuntary committal to psychiatric institution); 560/1993, *A. v. Australia*, para. 9.5 (immigration detention); 291/1988, *Torres v. Finland*, para. 7.4 (extradition); 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5 (presidential fiat) and 265/1987, *Vuolanne v. Finland*, para. 9.5 (solitary confinement). Concluding observations: India (1997), para. 438; Israel (1998), para. 317 (security detention); United Kingdom (2008), para. 17 (counter-terrorism); Rwanda (2009), para. 16 (recommending abolition of detention for vagrancy); Cameroon (1994), para. 204; Republic of Moldova (2002), para. 11; and Lithuania (2004), para. 13.

Communications Nos. 1460/2006, *Yklymova v. Turkmenistan*, para. 7.2–7.4 (house arrest) and 1172/2003, *Madani v. Algeria*, para. 8.5 (house arrest).

⁵ Communications Nos. R.1/4, *Torres Ramirez v. Uruguay*, para. 18; and 1449/2006, *Umarov v. Uzbekistan*, para. 8.6.

⁶ Communication No. 291/1988, *Torres v. Finland*, para. 7.2 (seven days). Concluding observations: Sri Lanka (1995) (one year).

detaining the individual.⁷ Detainees should be informed, in a language that they understand, of their right to take proceedings for a decision on the lawfulness of their detention and should be afforded prompt and regular access to counsel.⁸

17. A "court" must be established by law, and must either be independent of the executive and legislative branches or must enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.⁹ In general, the detainee has the right to appear in person before the court, and the court must have the power to order the detainee to be brought before it. The adjudication of the case should take place as expeditiously as possible.¹⁰

18. The Committee against Torture, in its general comment no. 2 (2008) on the implementation by States parties of article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has listed guarantees for all persons deprived of their liberty, including the right to challenge the legality of their detention or treatment. In its country reports, the Committee considers that a "State party must also adopt the measures necessary to guarantee the right of any person who has been deprived of their liberty to have access to an immediate remedy to challenge the legality of their detention" (CAT/C/CUB/CO/2, para. 8).

19. The Subcommittee on Prevention of Torture has adopted a provisional statement on the role of judicial review and due process in the prevention of torture in prisons (CAT/OP/2). The Subcommittee sets out requirements that must be observed so that individuals can defend themselves properly against any act by the State that might affect their rights, noting that "judicial intervention during the period of confinement, by judges other than those who determined the criminal charges, goes hand in hand with due process" (para. 14). The Subcommittee recommends that "States parties should consider effective judicial review and due process during the detention of individuals in criminal proceedings as a prerequisite for the prevention of ill-treatment or torture of persons deprived of their liberty and as a means of conferring legitimacy on the exercise of criminal justice" (para. 19). In its country reports, the Subcommittee has characterized the right to challenge the lawfulness of detention before court as a "fundamental safeguard against torture or other cruel, inhuman or degrading treatment or punishment", requiring the senior authorities in the institutions responsible for implementing habeas corpus to take the requisite steps to ensure the effectiveness of that right (CAT/OP/HND/1, para. 137).

20. Recalling article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance, which provides that an investigation should be conducted for as long as the fate of the victim of enforced disappearance remains unknown, the Working Group on Enforced or Involuntary Disappearances has reinforced the importance of guaranteeing the right to challenge the lawfulness of detention before court to clarify past cases of enforced disappearances (A/HRC/4/41/Add.1, paras. 61–63). It has recommended that "habeas corpus procedures that have been suspended in contradiction to the Declaration should be reopened and investigations should be effortlessly continued in order to endeavour to clarify past cases of enforced disappearances" (para. 108). In relation to the issue of deprivation of liberty, the Working Group on Enforced or Involuntary Disappearances has emphasized the importance of the constitutional, legal and regulatory

⁷ Communication No. 373/1989, *Stephens v. Jamaica*, para. 9.7.

⁸ Concluding observations: Switzerland (1996), para. 111; and Benin (2004), para. 16.

⁹ Communications Nos. 1090/2002, *Rameka v. New Zealand*, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court) and 291/1988, *Torres v. Finland*, para. 7.2 (finding review by Minister of the Interior insufficient); and general comment No. 32, paras. 18–22.

¹⁰ Communication No. 291/1988, *Torres v. Finland*, para. 7.3.

framework being in full conformity with international standards in order to protect against secret detention or disappearance (A/HRC/22/45/Add.2, para. 91).

B. Non-derogability of the right to challenge the lawfulness of detention before court

21. In its deliberation No. 9, the Working Group on Arbitrary Detention stated that the prohibition on arbitrary deprivation of liberty, and the right of anyone deprived of his or her liberty to bring proceedings before court in order to challenge the lawfulness of the detention, are non-derogable, under both treaty law and customary international law (A/HRC/22/44, para. 47). That view is consistent with the conclusions of a number of human rights mechanisms, as illustrated in the following section which deals with non-derogability of the right to challenge the lawfulness of detention in the contexts of an armed conflict, states of emergency, and counter-terrorism measures.

1. Non-derogability in armed conflict

22. International human rights law, and the rights related to liberty and security of the person in particular, apply everywhere and at all times, both in peace and in armed conflict, at home and abroad. There is agreement that the norms of international human rights instruments and customary international law protecting individuals against arbitrary detention shall be complied with by Governments in situations of armed conflict (A/HRC/16/47, para. 51).¹¹ International human rights law against arbitrary detention applies in parallel with the rules of international humanitarian law. International human rights law and the law of international armed conflict provide protection for individuals, and are complementary in nature. Neither provides authority for detention, and legality requires that the grounds (and procedure) be established by national law, in compliance with the further requirements of international law. That legal basis must satisfy the requirement of non-arbitrariness, and be proportionate, predictable and fair. These human rights law channels are not offered by the law of international armed conflict. This is particularly manifest given that human rights instruments set up supervisory organs with jurisdiction to provide adequate remedies to victims of breaches. When the laws of armed conflict were codified in the Geneva Conventions of 1949, the most common type of conflict was international armed conflict between States. Non-international armed conflicts between a State and non-State armed group, or between two or more non-State armed groups, are now the most common form of conflict. The treaty provisions relating to armed conflict that are applicable in such conflicts are minimal, and international human rights law provides important additional protections, as is clarified in the constant jurisprudence of the Working Group.

23. The International Committee of the Red Cross (ICRC) refers to the International Covenant on Civil and Political Rights as one of three instruments binding the States that are Parties to them.¹² Article 75, paragraph 4, of Protocol I reproduces most of the fair trial guarantees provided for in international human rights instruments. As noted in ICRC's commentaries, in each of these treaties there is a clause permitting derogations from the articles in question in times of war.¹³ Article 75 is not subject to any possibility of derogation or suspension and these provisions will play an important role in armed

¹¹ Also the ICRC commentaries to Protocol II, para. 4429, referring to United Nations General Assembly resolution 2675 (XXV), and resolution 2675 (XXV) as cited in A/HRC/16/47, para. 45.

¹² ICRC commentaries to Protocol I, para. 2928. See also A/HRC/16/47, para. 46.

¹³ Ibid., para. 3092.

conflict.¹⁴ In Protocol II, it is emphasized in the preamble that "international instruments relating to human rights offer a basic protection to the human person". ICRC notes that this provision establishes the link between Protocol II and the international instruments on human rights.¹⁵

24. In its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice affirmed the applicability of the International Covenant on Civil and Political Rights during armed conflicts, save through the effect of provisions for derogation of any kind to be found in article 4 of the Covenant. The Court confirmed its view in its advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (para. 106), and in its judgment of 19 December 2005 on the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (para. 216). The complementary application of the Covenant and of international humanitarian law was addressed by the Human Rights Committee in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (CCPR/C/21/Rev.1/Add.13, para. 11; A/HRC/16/47, paras. 39 and 40) and in the constant jurisprudence of the Working Group on Arbitrary Detention.

2. Non-derogability in states of emergency

25. The Working Group on Arbitrary Detention attaches particular importance to effective internal control mechanisms over the legality of detention. The remedy of habeas corpus is one of the most effective means of preventing and combating arbitrary detention. Procedural guarantee must not be suspended or rendered impracticable in states of emergency (A/HRC/7/4, para. 64; E/CN.4/1995/31, para. 25 (d)). The Subcommittee on Prevention of Torture has recommended that "the effectiveness and absolute non-derogability of habeas corpus be guaranteed in states of emergency" (CAT/OP/HND/1, para. 137). In addition, the Committee on Enforced Disappearances has recommended the adoption of "the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure" (CED/C/ESP/CO/1, para. 26).

26. The Working Group has, in its constant jurisprudence, adopted the legal analysis in the Human Rights Committee's general comment No. 29 (2001) on states of emergency (article 4), paragraphs 11 and 16. In addition to those rights enumerated in article 4, paragraph 2, of the Covenant, certain other rights are non-derogable even during a state of emergency, including the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention. These non-derogable guarantees are customary international law binding on States that are not parties to the Covenant, and are also peremptory norms of international law.

27. In 2006, a report on the situation of detainees at Guantánamo Bay was jointly issued by a group of special procedures mandate holders, including the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (E/CN.4/2006/120). The group examined, inter alia, whether the right to challenge the lawfulness of detention may be limited,

¹⁴ A/HRC/16/47, para. 48.

¹⁵ ICRC commentaries to Protocol II, para. 4427. See also A/HRC/16/47, para. 49.

restricted or derogated from in the context of public emergencies or armed conflict. Relying on the jurisprudence of the International Court of Justice and on the Human Rights Committee's general comment No. 29 in which it is stated that "procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights", it determined that the main elements of article 9 of the Covenant, such as habeas corpus, must be fully respected even during states of emergency (E/CN.4/2006/120, para. 14).

3. Non-derogability and counter-terrorism measures

28. The Working Group has expressed its concern about the frequent use of various forms of administrative detention, entailing restrictions on fundamental rights (E/CN.4/2005/6, para. 61). It has noted a further expansion of some States' recourse to emergency legislation diluting the right of habeas corpus or amparo and limiting the fundamental rights of persons detained in the context of the fight against terrorism by means of new anti-terror or internal security legislation allowing detention for an unlimited time or for very long periods, without charge, without the detainees being brought before a judge, and without a remedy to challenge the legality of the detention (*ibid.*). The Working Group has observed that this kind of administrative detention, which often is also secret, aims at circumventing the legal time limits governing police custody and pretrial detention and at depriving the persons concerned of the judicial guarantees recognized to all persons suspected or accused of having committed an offence (*ibid.*).

29. Although it is acknowledged that counter-terrorism measures might require the adoption of specific measures limiting certain guarantees, including those relating to detention and the right to a fair trial, in a very limited manner, the Working Group has repeatedly stressed that in all circumstances deprivation of liberty must remain consistent with the norms of international law (E/CN.4/2004/3, para. 84). The right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention is a personal right, which must "in all circumstances be guaranteed by the jurisdiction of the ordinary courts" (*ibid.*, para. 85).

30. In numerous cases presented before it in recent years, as well as through information received from non-governmental organizations working in the field and national human rights institutions, the Working Group has noticed the continued practice by some States of using deprivation of liberty without charges or trial or other applicable procedural guarantees against persons accused of terrorist acts, contrary to international human rights instruments (A/HRC/10/21, para. 52). The Working Group has adopted a list of principles based on articles 9 and 10 of the Universal Declaration of Human Rights and on articles 9 and 14 of the International Covenant on Civil and Political Rights (*ibid.*, para. 53). These principles guarantee that persons detained under charges of terrorist activities shall enjoy the effective right to habeas corpus following their detention. The exercise of the right to habeas corpus does not impede on the obligation of the law enforcement authority responsible for the decision for detention or maintaining the detention, to present the detained person before a competent and independent judicial authority within a reasonable time period (*ibid.*, para. 54 (f)).

31. In the report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), the group of special rapporteurs recalled the jurisprudence of the International Court of Justice on the complementarity of international humanitarian law and human rights law as well as the affirmation by the Human Rights Committee in its general comment No. 31 (2004). The group of special rapporteurs stated that "international obligations regarding the struggle against terrorism might make the apprehension and detention of some of these persons a duty for all States" (*ibid.*, para. 26). Drawing on its finding that such deprivation of liberty is governed by human rights law, and specifically articles 9 and 14 of the

International Covenant on Civil and Political Rights, this includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights. It concluded that "any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations to this right should be viewed with utmost concern" (ibid.).

32. More recently, a joint study on global practices in relation to secret detention in the context of countering terrorism was prepared by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the question of torture, the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances and the Vice-Chair of the Working Group on Arbitrary Detention (A/HRC/13/42). They concluded that secret detention was irreconcilably in violation of international human rights law, including during states of emergency and armed conflict, and in violation of international humanitarian law during any form of armed conflict. Secret detention violates the right to personal liberty and the prohibition of arbitrary arrest or detention. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus (A/HRC/16/47, para. 54). The group of experts underlined the centrality of "effective habeas corpus reviews by independent judicial bodies" to ensuring respect for the right to personal liberty (A/HRC/13/42, para. 292 (b)). The group recommended that "domestic legislative frameworks should not allow for any exceptions from habeas corpus, operating independently from the detaining authority and from the place and form of deprivation of liberty ... The law should foresee penalties for officials who refuse to disclose relevant information during habeas corpus proceedings" (ibid.).

C. Exercise of the right by vulnerable groups

33. Further to the procedural guarantees that apply to all persons deprived of their liberty, additional safeguards are necessary for the exercise of the right to challenge the lawfulness of detention by particular vulnerable groups, including by child detainees, by detained migrants, including asylum seekers, and by persons detained involuntarily on health grounds.

1. Child detainees

34. The Convention on the Rights of the Child, in article 37 (b), obligates State parties to ensure that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". It guarantees to every child deprived of his or her liberty "the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" (art. 37 (d)).

35. Rule 13 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, on the right to challenge the lawfulness of detention, guarantees that "juveniles deprived of their liberty shall not for any reason related to their status be denied the civil, economic, political, social or cultural rights to which they are entitled under national or international law, and which are compatible with the deprivation of liberty." Rule 7.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) calls for the guarantee of basic procedural safeguards at all stages of the proceedings, including the right to appeal to a higher authority. The issue of release is to be considered by a judge or other competent official or body without delay (rule 10.2). In the

commentary to the Beijing Rules, "other competent official or body" is defined as any person or institution in the broadest sense of the term, including community boards or police authorities having the power to release an arrested person. Rule 20.1 provides that "each case shall from the outset be handled expeditiously, without any unnecessary delay". The commentary highlights as a paramount concern "the speedy conduct of formal proceedings in juvenile cases".

36. The Committee on the Rights of the Child has interpreted the procedural guarantees in article 37 (d) of the Convention on the Rights of the Child in its general comment No. 10 (2007) on children's rights in juvenile justice. The Committee specifies that the right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision. The right to a prompt decision means that a decision must be rendered as soon as possible, within or not later than two weeks after the challenge is made" (para. 84). With regard to the time limit between the commission of the offence and the decision by the court or other competent judicial body, the Committee stipulates that this should be much shorter than those set for adults, without compromising the full respect for the human rights of the child and legal safeguards (para. 52). The Committee regularly stresses the need for effective complaint procedures in general, and calls for the establishment of an "independent, child-sensitive and accessible complaint system for children" within the context of the administration of juvenile justice (CRC/C/15/Add.193, para. 62 (j); CRC/C/15/Add.198, paras. 51 and 53).

2. Detained asylum seekers and migrants in an irregular situation

37. The Convention relating to the Status of Refugees, of 1951, and its 1967 protocol, lay down basic minimum standards for the treatment of refugees, including free access to the courts of law on the territory of States parties and the ability to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specifically designated by the competent authority (arts. 16 and 32 (2) of the Convention).

38. The Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, of 2012, published by the United Nations High Commissioner for Refugees, include respect for the detainee's right, either personally or through a representative, to challenge the lawfulness of detention before a court of law at any time (guideline 7). The guideline places the burden of proof for establishing the lawfulness of the detention on the authorities in question and requires that authorities establish the legal basis for the detention and justify it according the principles of necessity, reasonableness and proportionality, showing that less intrusive means of achieving the same objectives have been considered in the individual case (para. 47 (v)).

39. The Working Group on Arbitrary Detention has devoted particular attention to the situation of detained migrants, including migrants who are undocumented or in an irregular situation, asylum seekers awaiting the outcome of their asylum application and failed asylum seekers awaiting removal (Working Group opinions 55/2011 and 14/2011). Through its annual reports and in its deliberation no. 5 (1999) concerning the situation of immigrants and asylum seekers, the Working Group has set out a number of procedural guarantees for migrants in detention. In the case of absence, violation, circumvention or non-implementation of such procedural guarantees, the Working Group may conclude that the custody is arbitrary.

40. Procedural guarantees for detained migrants include notification of the custodial measure in writing, in a language understood by the asylum seeker or immigrant, stating the grounds for the measure, and setting out the conditions under which the asylum seeker or

immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned (E/CN.4/2000/4, principle 8). Detention must be ordered or approved by a judge or a body affording equivalent guarantees of competence, independence and impartiality (E/CN.4/1999/63, para. 69). The procedural guarantee of article 9, paragraph 4, of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. There should be automatic, regular and judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. A maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released (A/HRC/13/30, para. 61). Established time limits for judicial review must be obtained in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State.

41. The Working Group (A/HRC/13/30/Add.2) and the Committee against Torture (CAT/C/MRT/CO/1) have called on States parties to provide access to effective judicial remedies to challenge the legality of administrative decisions on detention.

42. The Human Rights Committee has reiterated its view that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party. This is articulated in general comments No. 8 (1982) on the right to liberty and security of persons, No. 15 (1986) on the position of aliens under the Covenant, and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (HRI/GEN/1/Rev.9 (Vol. I) p. 179, paras. 1 and 7; p. 189, para. 2; and p. 245, para. 10). The Committee affirmed that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed" (CCPR/C/59/D/560/1993, para. 9.4).

43. The Special Rapporteur on the human rights of migrants, in his 2012 annual report on the detention of migrants in an irregular situation (A/HRC/20/24), recalled the statement of the Working Group on Arbitrary Detention that there should be automatic, regular and judicial, not only administrative, review of detention in each individual case, and that review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review (*ibid.*, para. 23). The Special Rapporteur recommended that Governments ensure that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention (*ibid.*, para. 72 (a)). Further, all migrants deprived of their liberty should be informed in a language they understand, if possible in writing, of the reasons for the detention and be entitled to bring proceedings before a court, so that the court can decide on the lawfulness of the detention. Migrants in detention shall be assisted, free of charge, by legal counsel and by an interpreter during administrative proceedings.

44. Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families sets out the right to liberty and security of person for migrant workers and members of their families and the right not to be subjected individually or collectively to arbitrary arrest or detention (paras. 1 and 4). It articulates that migrant workers and members of their families who are deprived of their liberty by arrest or detention are entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful (para. 8). In attending such proceedings, they are entitled to have cost-free assistance to an interpreter if they cannot understand or speak the language used (*ibid.*). Where it has been determined that migrant workers and members of their families have

been victims of unlawful arrest or detention, the Convention guarantees an enforceable right to compensation (para. 9).

45. The Committee on Migrant Workers has elaborated on the content of article 16 of the International Convention in its general comment no. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families. The Committee has stated that the scope of the judicial review cannot be confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is not established by law (*ibid.*, para. 32). Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power. The burden of proof rests on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced. The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention, and have timely access to effective legal remedies (*ibid.*, para. 33; CMW/C/BIH/CO/2, para. 26). A claim for compensation may be made where the arrest or detention is found unlawful under national or international law and States parties must ensure that the right to compensation can be effectively enforced before the competent domestic authority (CMW/C/GC/2, para. 35). The Committee cautions States parties to ensure that migrant workers and members of their families are not expelled while their claim is being considered.

3. Involuntary detention of persons with a disability

46. The Convention on the Rights of Persons with Disabilities, in article 14, requires States Parties to "ensure that persons with disabilities ... are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law ... If persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law". The Committee on the Rights of Persons with Disabilities, in its general comment No. 1 on article 12 of the Convention regarding equal recognition before the law, has affirmed that respecting the right to legal capacity of persons with disabilities on an equal basis includes respecting the right of persons with disabilities to liberty and security of the person (paras. 40 and 41). It has drawn attention to the problem of denial of the legal capacity of persons with disabilities and their detention in institutions against their will, without their consent or with the consent of a substitute decision-maker. This constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. The Committee requires States to refrain from such practices and to establish a mechanism to review cases of placement in a residential setting without specific consent.

47. The Committee has consistently held that disability is not a legitimate ground under international law for depriving persons of their liberty (CRPD/C/SLV/CO/1, paras. 31 and 32) and that deprivation of liberty solely on the basis of disability is contrary to and violates article 14 of the Convention (CRPD/C/PER/CO/1, paras. 28 and 29). Involuntary committal or institutionalization on the grounds of disability, or perceived disability, particularly on the basis of psychosocial or intellectual disability or perceived psychosocial or intellectual disability, is not in compliance with the Convention, and the Committee has called upon States to amend laws and to adopt measures to prohibit involuntary committal or internment, and to design and implement de-institutionalization strategies (CRPD/C/ARG/CO/1 para. 23; CRPD/C/CHN/CO/1 paras. 25 and 26). The Committee has emphasized that no individual can be deprived of his or her liberty against his or her will in any kind of mental facility and that States parties are required to ensure that all mental health services are provided on the basis of the free and informed consent of the person concerned (CRPD/C/AUT/CO/1, paras. 29–31). States need to provide due process of law guarantees and appropriate judicial review to persons with disabilities deprived of

their liberty as a result of a process in which they have been declared exempt from criminal responsibility (CRPD/C/ARG/CO/1, paras. 25 and 26).

48. The Working Group on Arbitrary Detention has in its constant jurisprudence stated that all persons deprived of their liberty on health grounds must have judicial means of challenging their detention (E/CN.4/2004/3, para. 87). In its deliberation No. 7 on issues related to psychiatric detention, the Working Group stated that preventing mentally disabled persons from leaving may, in principle, amount to deprivation of liberty (E/CN.4/2005/6, para. 51). When assessing whether the measures taken are in compliance with international standards, the vulnerable position of persons affected by (alleged) illness has to be duly taken into consideration (E/CN.4/2005/6, para. 57). The Working Group applies the following criteria: Article 9, paragraph 4, of the International Covenant on Civil and Political Rights shall be applied to anyone confined by a court order, administrative decision or otherwise in a psychiatric hospital or similar institution on account of his mental disorder. In addition, the necessity whether to hold the patient further in a psychiatric institution shall be reviewed regularly at reasonable intervals by a court or a competent independent and impartial organ, and the patient released if the grounds for his detention do not exist any longer. In the review proceedings, his vulnerable position and the need for appropriate representation must be taken into consideration (E/CN.4/2005/6, para. 58 (e)).¹⁶

III. Regional legal frameworks

49. The right to challenge the lawfulness of detention before court is enshrined in all of the major regional human rights treaties, including the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the Arab Charter on Human Rights and the European Convention on Human Rights. It is also captured in non-binding regional instruments, such as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Guidelines on Conditions of Police Custody and Pretrial Detention in Africa, the American Declaration of the Rights and Duties of Man, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and the ASEAN Human Rights Declaration. Furthermore, it been the subject of interpretation by the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights.

A. Africa

50. The African Charter on Human and Peoples' Rights, in article 7 (1) (a), guarantees "the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force". In its jurisprudence, the African Commission on Human and Peoples' Rights has pronounced that "the writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and to demand that the authority either release or justify all imprisonment" (143/95-150/96: Constitutional Rights Project and Civil Liberties Organization – Nigeria, para. 23). At its fifty-fifth session, the African Commission adopted the Guidelines on Conditions of Police Custody and Pre-Trial Detention in Africa (2014);¹⁷ under article 5 (h), upon arrest, persons must be informed of the right to challenge their detention.

¹⁶ See how this is reflected in national case law in *P & Q* [2014] UKSC 19.

¹⁷ http://www.achpr.org/files/news/2013/03/d78/draft_guidelines_pre_trial_detention.pdf.

51. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003, closely follows article 9, paragraph 4, of the International Covenant on Civil and Political Rights in section M. It details the components necessary in order to ensure exercise of the procedural guarantee, including the necessity for States to enact legislation to ensure the right. It stipulates that "anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty". It entrusts judicial bodies to, at all times, hear and act upon petitions for habeas corpus, amparo or similar procedures, and states that no circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures. These are defined as "a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body" (section S (m)).

B. Americas

52. The American Declaration of the Rights and Duties of Man (1948) establishes that "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released" (article XXV). Article 7, paragraph 6, of the American Convention on Human Rights provides: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

53. The Inter-American Court of Human Rights, in advisory opinion OC-8/87 (30 January 1987) on habeas corpus in emergency situations, stated that the protection is among "those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by article 27 (2) and that serve, moreover, to preserve legality in a democratic society". It is "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered."

54. In its jurisprudence, to which the Working Group on Arbitrary Detention gives great weight in its own jurisprudence, the Inter-American Court has affirmed "that the authority which decides on the legality of an arrest or detention must be a judge or court; article 7, paragraph 6 of the Convention is therefore ensuring judicial control over the deprivation of liberty".¹⁸ "The review by a judge or a court is a fundamental requirement to guarantee adequate control and scrutiny of the administrative acts which affect fundamental rights". Remedies under article 7, paragraph 6, of the Convention "must not only exist formally in law but must be effective; in other words, they must comply with the objective of obtaining, without delay, a decision on the lawfulness of the arrest or detention."¹⁹ "Migratory

¹⁸ *Vélez Loor v. Ecuador*, para. 126.

¹⁹ *Nadege Dorzema et al. v. Dominican Republic*, case No. 1351-05, para. 141.

regulations which did not establish remedies to contest the lawfulness of the arrest and detention ... but only established the possibility for the detainee to 'refute the charges' on which his or her deportation was based or to be 'heard regarding the charges indicated in the arrest warrant' or to 'provide evidence opposing the deportation' are in violation of article 7, paragraph 6".²⁰

55. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008, guarantee that "all persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights" (Principle V). Further, "persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law" (Principle VII).

56. The Inter-American Commission stated that it "cannot overemphasize the significance of ensuring effective supervisory control over detention as an effective safeguard". It noted that the right to challenge the lawfulness of detention before court plays a fundamental role in protecting against arbitrary arrest, clarifying the situation of missing persons, and preventing the use of torture or other cruel, inhuman or degrading treatment as an "effective assurance that the detainee is not exclusively at the mercy of the detaining authority". The Commission concluded that "the requirement that detention not be left to the sole discretion of the State agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context" and the procedural guarantee "is not susceptible to abrogation. It applies in all situations of deprivation of liberty".

57. The Inter-American Commission set out the procedural requirements of the right: a judicial authority or a "quasi-judicial" board that decides petitions, not an administrative body, must have the power to order the detainee to be produced and also to release him or her. It must be impartial and different from the authority ordering and implementing the detention. A detained person has the right to petition "at all times" and the proceedings must comply with the fundamental rules of procedural fairness, including "an opportunity to present evidence and to know and meet the claims of the opposing party". The detainee must have an "opportunity to be represented by counsel or some other representative". The proceedings must occur "without delay" and "as soon as practicable". The decision to detain must be reviewed at regular intervals.

C. Arab region

58. Article 14, paragraph 6, of the Arab Charter on Human Rights (2004) guarantees that "anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful". Any victim of unlawful arrest or detention is entitled to compensation (art. 14 (7)). The legal protections provided for in article 14 of the Charter cannot be derogated from, not even in times of public emergency (art. 4 (1 and 2)).

²⁰ Ibid., para. 143.

D. ASEAN region

59. The ASEAN Human Rights Declaration (2012) guarantees the right to personal liberty and security and to be free from arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty (article 12). In the Phnom Penh Statement adopting the Declaration, ASEAN and its member States reiterated their commitment to, *inter alia*, the Universal Declaration of Human Rights and other international human rights instruments to which ASEAN member States are parties.

E. Europe

60. Article 5, paragraph 4, of the European Convention on Human Rights (1950) provides that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". Victims of unlawful arrest or detention have an enforceable right to compensation (art. 5 (5)). The European Court of Human Rights has clarified the right to court review in its extensive jurisprudence, to which the Working Group on Arbitrary Detention continues to give great weight in its own jurisprudence. The Court has stated that the purpose of article 5, paragraph 4, is to grant persons deprived of liberty the right to challenge the interference with that right through rapid, effective judicial review of the legality of the measure. The right to court review of detention in domestic legislation must be effective and real, allowing for accessibility and certainty. The procedure is to be guided by the adversarial principle and equality of arms. Generally, this requires a hearing of the detainee before the judicial organ, a body independent of the executive, with a guarantee of impartiality and the force to implement its decisions. Legal counsel is mandatory in cases of minors, internment in psychiatric centres, and cases concerning discretionary life sentences. A decision should be attained in the shortest time possible. The Charter of Fundamental Rights of the European Union recognizes, in article 6, the right to liberty and security, among a range of personal, civil, political, economic and social rights of European Union citizens and residents, and enshrines them into European Union law.

IV. National legal frameworks

61. The 44 responses to the Working Group's questionnaire from United Nations Member States and the 18 from national human rights institutions are posted on the Working Group's webpage. A catalogue of Member States' relevant legal frameworks is replicated in tabular format in the annex to the present report. The prohibition of arbitrary deprivation of liberty and the right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention are uniformly and generally adopted in the domestic legislation of States, usually in constitutional provisions or otherwise recognized to be of a fundamental nature in the domestic legal order. The States expressly declare in their replies to the questionnaire that they comply with international law, as they do in their reporting to other United Nations human rights bodies and in statements in the Human Rights Council and other United Nations organs. In these contexts, and in the different forms of State-to-State peer review, it is made clear that, whether or not they have ratified the International Convention on Civil and Political Rights, they regard themselves bound by international law on court review of detention.

62. The responses submitted by non-State stakeholders are also posted on the Working Group's website. These contributions have been taken into account in preparing the draft principles and guidelines on the right to challenge the lawfulness of detention. The

Working Group would like to acknowledge the very comprehensive contribution made by Oxford Pro Bono Publico at the University of Oxford, which submitted "Remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court: a comparative and analytical review of State practice" (April 2014). This has been of particular assistance to the Working Group in establishing State practice and the requisite *opinio juris*.

63. The Working Group recalls the statement by the International Court of Justice in *Jurisdictional Immunities*: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them ... In the present context, State practice of particular significance is to be found in the judgments of national courts".²¹ In deliberation No. 9 (2012) concerning the definition and scope of arbitrary deprivation of liberty under customary international law,²² the Working Group adopted the approach to formation of customary international law currently restated in the work of the International Law Commission (A/CN.4/663) and reflected in the request by the Human Rights Council to produce the present report. When the Working Group applies the law, and when it finds violations of human rights obligations, it is bound by the general method of international law, in treaty interpretation and the application of customary international law. In addition to the materials presented in the present report to the Human Rights Council, important sources of international law can be found in the Council's own procedures and their outcomes, with the additional reporting and peer-review procedures, including those of the universal periodic review.

V. Conclusion

64. The present report demonstrates how the procedural guarantee has been developed in different international instruments, in regional legal frameworks, and in the domestic law of States from a diversity of legal traditions. The reaffirmation and clarification of the due process safeguard is a feature of international treaties and domestic legislation, the jurisprudence of international human rights mechanisms, including treaty bodies and special procedure mandate holders, regional human rights mechanisms and national courts. The procedural guarantee is viewed as an essential component of the due process rights that are necessary to protect the right to liberty and security of the person in all situations of deprivation of liberty and to prevent arbitrary arrest, detention or exile, enforced disappearance, or risk of torture and other cruel, inhuman or degrading treatment or punishment. The review of legal frameworks further confirms that, where it has been determined that the fundamental rights of the detainee have been violated, such wrongs demand a remedy.

65. The extensive survey undertaken of the relevant sources shows that the right to challenge the lawfulness of detention and the right to a remedy where there is a wrong is supported by uniform international practice, State practice and the *opinio juris* of States. It shows not only the existence of customary norms of international law that apply *erga omnes*, but also that these norms are peremptory rules, *jus cogens*, in

²¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, 122–23 [55].

²² Deliberation No. 9 has been cited as one source on the approach to identification of customary international law by Sir Michael Wood, First Report on formation and evidence of customary international law, International Law Commission, Sixty-fifth session, 17 May 2013, (A/CN.4/663, para. 53) and in Sir Michael's Second Report (A/CN.4/672, paras 41.8 and 76.6).

accordance with article 53 of the Vienna Convention on the Law of Treaties. The concern of the survey has not been with the factual compliance with international law, domestic legislation, the jurisprudence of higher courts or statements by governments. The basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before a court, which the Working Group is drafting at the request of the Human Rights Council, is intended as an instrument for securing and improving such compliance.

Annex

[English only]

Catalogue of national legal frameworks citing the right to challenge the lawfulness of detention before court

1. On 17 June 2013, the Office of the United Nations High Commissioner for Human Rights, in its capacity as Secretariat of the Working Group on Arbitrary Detention, transmitted a Note Verbale to the Permanent Missions to the United Nations and to the United Nations Office at Geneva informing them that, in accordance with Human Rights Council resolution 20/16 of 6 July 2012, paragraph 10, the Working Group is in the process of preparing draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty to challenge the lawfulness of detention before court.

2. As these principles and guidelines are being developed with the aim of assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty in compliance with international human rights law, the Working Group was directed by the Council, in paragraph 11(a) of res. 20/16, to seek the views of Governments in their preparation. The Working Group thereby transmitted a questionnaire, requesting Governments to provide, *inter alia*, how Article 9(4) of the International Covenant on Civil and Political Rights is incorporated into their domestic legislation. States not party to the International Covenant were requested to provide the legal framework regulating the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention.

3. The questionnaire was completed and returned to the Working Group by 44 Member States. As notified, all replies have been posted on the web page of the Working Group and made available to the public.²³ The entire responses have been taken in to account in developing the draft principles and guidelines. Reproduced in tabular format below are only the national legal provisions incorporating article 9 (4) of the International Covenant, or the abovementioned right, in to domestic law.

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
ARGENTINA	Constitution (Constitución Nacional)	Art. 43
	Criminal Code of Procedure(Código Procesal Penal de la Nación)	Arts. 280, 316-319
	National Mental Health Law (Ley Nacional de Salud Mental, 26.657, publicada en el Boletín Oficial el 3/12/2010)	Arts. 14, 20, 22
ARMENIA	Constitution of the Republic of Armenia	Arts. 16, 16 Part 4, 18 Part 1
	Criminal Code	Art. 348

²³ <http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx>.

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
AZERBAIJAN	Criminal Procedure Code	Arts. 22, 63 (17), 63 (19), 65 (24), 73, 77
	Civil Code	Art. 1064
	Criminal Procedure Code (14 July 2014)	Arts. 14, 101.5, 384.1, 384.1.8, 449, 449.2, 451.1, 451.3, 452.1, 473
	Administrative Offences Code (11 July 2000)	Arts. 371.1.4, 373.5, 374.5, 399.6
BENIN	Law on Providing Rights and Freedoms for Detained Persons (22 May 2012)	Art. 15.1.15
	Criminal Procedure Code (Code de procedure penale en République du Benin, loi n°2012-15 du 17 décembre 2012)	Arts. 157 (2), 206, 207, 210(1)
BOSNIA AND HERZEGOVINA	Criminal Procedure Code (CPC)	Arts. 134, 139, 436, 439
	Law on the Stay and Movement of Aliens and Asylum	Art. 101
	Law on Ombudsman for Human Rights of Bosnia and Herzegovina	Art. 24
BULGARIA	Constitution (promulg. SG 56 of 13 July 1991)	Art. 30(3)
	Criminal Procedure Code (promulg. SG 86 of 28 October 2005)	Arts. 63-65
	Health Act (Section II of Chapter Five, promulg. SG 70 of 10 August 2004)	Arts. 155-165
	Health Act (new SG 41 of 2009)	Art 61(5)
	Law on the Ministry of Interior (promulg. SG 17 of 24 February 2006)	Art. 63(4)
	Law on State Agency National Security (promulg. SG 109 of 20 December 2007; new SG 52 of 2013)	Art. 124a(7)
	Military Police Act (promulg. SG 48 of 24 June 2011)	Art. 13(2)
	Law on Responsibility of the State and Municipalities for Damages	Art. 2(1)
BURKINA FASO	Constitution (La Constitution du 11 juin 1991)	Arts. 3, 4
	Criminal Code (La loi no. 43-96 du 13 novembre 1996 portant Code pénal et modifiée par la loi no. 6-2004 du 6 avril 2004)	Arts. 141-148, 356-360, 398-405

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
	Criminal Procedure Code (L'ordonnance no. 68-7 du 21 février 1968 portant Code de Procédure Pénal ensemble ses modificatifs)	Arts. 136-150, 393-397
	Civil Procedure Code (La loi no. 22-99 du 18 mai 1999 portant Code de procédure civile)	Arts. 2, 3
CHILE	Constitution (Constitución Política de la República, publicada en el Diario Oficial el 22 de septiembre de 2005)	Art. 19, 21
	Code of Criminal Procedure (Código Procesal Penal, Ley no. 19.696 publicado en el Diario Oficial el 12 de octubre de 2000)	Art. 94, 95, 140
COLOMBIA	Constitution (Constitución Política de Colombia de 1991)	Art. 30
	Law 1095 of 2006 (la Ley 1095 de 2006)	Arts. 1-10
ECUADOR	Constitution (Constitución de la República del Ecuador, Registro Oficial 449 de 20-oct-2008)	Art. 89
	Law of Fair Trial and Constitutional Control (Ley Orgánica de Garantías Judiciales y Control Constitucional, Registro Oficial Suplemento 52 de 22-oct-2009)	Arts. 43, 44
	Code of Criminal Procedure (Código de Procedimiento Penal, Registro Oficial Suplemento 360 de 13-ene-2000)	Arts. 422, 428
ESTONIA	Police and Border Guard Act (2009)	Art. 733(5)
	Mental Health Act (1997)	Art. 13(5)
	Law of Criminal Procedure	Art 217(7)
GEORGIA	Constitution (24 August 1995)	Art. 18(7)
	Criminal Procedure Code of Georgia (CPCG, 9 October 2009)	Arts. 38(1), 92(1), 176(5), 207
	Administrative Offences Code of Georgia (AOCG)	Arts. 251, 281
	The Law of Georgia on Mutual Legal Assistance in Criminal Matters (MLACM)	Arts. 30, 54
	Law of Georgia on Cooperation of Georgia with the International Criminal Court (CGICC)	Arts. 19(1), 23(5), 24(1)

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
GERMANY	Constitution (Basic Law, Grundgesetz GG)	Art. 104(2)
	Code of Criminal Procedure (Strafprozessordnung (StPO))	Sections 115a, 117, 118, 299
GREECE	Constitution	Art. 6
	Code of Criminal Procedure	Arts. 279(2), 285, 288, 533
GUATEMALA	Constitution (Constitución Política de la República, entró en vigencia el 14 de enero de 1986)	Art. 263
	Amparo, Habeas Corpus and Constitutionality Law. Decree 1-86 (Ley de Amparo, Exhibición Personal y de Constitucionalidad, Decreto número 1-86, entro en vigencia el 14 de enero de 1986)	Art. 82, 85, 86-87
IRAQ	Constitution (2005)	Art. 4
	Criminal Procedure Rules Law (No. 23 of the year 1971)	Arts. 249, 252, 270 and 271
	Prison Administration Law	Section 13 (5)
IRELAND	Constitution (1937)	Art. 40.4
	Immigration Act (1999)	Section 5(5)
	Immigration Act (2003)	Section 5(4)
	Refugee Act (1996)	Section 9 (8-16)
	Rules of the Superior Courts	Order 84 Rule 2
JORDAN	Code of Criminal Procedure	Arts. 107, 108/2
KAZAKHSTAN	Constitution	Art. 16
	Code of Criminal Procedure	Arts. 39, 40, 41, 43, 103, 104, 105, 109, 110(1), 111, 399
	Code of Administrative Offences (CAO)	Arts. 633, 657, 658, 678
KENYA	Constitution (27 August 2010)	Arts. 20(2), 22(1), 22(2), 22(3), 23(3), 25(d), 165(3)
KUWAIT	Code of Criminal Procedure	Art. 14
	Law 17 of 1960	Art 69
LEBANON	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	
LITHUANIA	Code of Criminal Procedure	Arts. 130 Part 1&2, 140 Part 8
	Code of Administrative Offences (CAO)	Art. 271, 275

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
	Law on Compensation for Damage Inflicted by Unlawful Actions of State Institutions and the Representation of the State	Art. 3 (Part 1)
MEXICO	Constitution (Constitución política de los Estados Unidos Mexicanos)	Arts. 1, 14, 16, 17, 18, 19, 103 and 107
	Military Code (Código de Justicia Militar)	Arts. 80, 492, 505, 507, 509, 514, 616
	National Commission on Human Rights Law (Ley de la Comisión Nacional de los Derechos Humanos)	Regulates the role of the NCHR
	Amparo Law (Ley de Amparo)	Arts. 6, 15, 17, 77, 107.II, 108
	Victims' Law (Ley General de Víctimas)	Art. 2
MONACO	Sovereign Ordinance No. 13.330 of 12 February 1998	Includes Art.9(4) ICCPR
	Code of Criminal Procedure – amended by the Law 1.343 of 26 December 2007	Arts. 197-199, 202-202/4
	Law No. 1039 of 26 June 1981	Art. 12
NORWAY	Human Rights Act of 22 May 1999 No. 30	Sections 2, 3
	Criminal Procedure Act of May 1981 No. 25	Sections 185, 187a), 444, 445, 447
OMAN	Royal Decree No. 101/96 of 2 November 1996	Arts. 22-25
	Code of Criminal Procedure, promulgated by Royal Decree No. 97/99	Arts. 5(1), 59
PARAGUAY	Constitution (Constitución Nacional)	Art. 133
	Criminal Procedure Code (Código Procesal Penal de la República del Paraguay)	Art. 240
QATAR	Code of Criminal Procedure	Arts. 157, 396
REPUBLIC OF KOREA	Constitution (1948)	Art. 12.6
	Criminal Procedure Act (adopted in 1980, amended in 1987, 1995, 2005 and 2007)	Art. 214-2
	Habeas Corpus Act (2007, amended in 2008)	Art. 3
	Administrative Litigation Act	No provisions specified

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
RUSSIAN FEDERATION	Constitution	Art. 46 (2)
	Code of Administrative Offences of the Russian Federation No. 195-FZ of 30 December 2001	Arts. 30.2
	Code of Criminal Procedure	Arts. 125, 126, 133(3), 135, 136
	Civil Code	Art. 1070(1)
	Federal Constitutional Act No. 1-FKZ of 26 February 1997 on the Human Rights Ombudsman (as amended on 28 December 2010)	Art. 29, paragraph 1, point 3
SENEGAL	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	
SLOVENIA	Constitution (23 December 1991)	Art 20
	Criminal Procedure Act	Arts. 157(7), 202(4), 538, 542(1)&(3)
	Mental Health Act	Arts. 12-14
	Aliens Act	Arts. 76, 78
	Asylum Act	Art. 27
SPAIN	Constitution (Constitución Española de 29 de diciembre 1978)	Art. 17.4
	Organic Law 6/1984 of 24 May 1984 (Ley Orgánica 6/1984, de 24 de mayo, reguladora del procedimiento de «Habeas Corpus»)	No express provisions cited
	Organic Law 5/2000 of 12 January 2000 (Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores)	Art. 17.6
	Law 1/2000 of 7 January 2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (Vigente hasta el 22 de Julio de 2014)	Art. 763
	Royal Decree of 14 September 1882 (Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal: arts. 489 a 501)	Arts. 489-501
	Penal Code (Código Penal)	Art. 530
SRI LANKA	Constitution	Art. 126

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
SUDAN	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	---
SWEDEN	The response provided was not included as the submission did not correspond precisely to the exigencies of the information sought.	---
SWITZERLAND	Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst., Recueil systématique RS 101)	Arts. 31(3), 31(4)
	Criminal Procedure Code (5 October 2007 RS 312.0)	Arts. 224-228, 230, 233
	Criminal Code (21 December 1937 RS 311.0)	Arts. 62d, 64b
	Federal Act on International Mutual Assistance in Criminal Matters (20 March 1981 RS 351.1)	Art. 48
	Code of Juvenile Criminal Procedure (20 March 2009 RS 312.1)	Art. 27
	Civil Code (10 December 1907 RS 210)	Arts. 426, 426(4), 450
	Federal Act on Foreign Nationals (16 December 2005 RS 142.20)	Art. 80
TURKEY	Code of Criminal Procedure	Arts. 101(5), 104(1), 104(2), 105, 141
UGANDA	Constitution of the Republic of Uganda, 1995	Arts. 23(7), 50(1), 50(2)
	Police Act, Cap 303, Laws of Uganda 2000	Sections 24(4), 25(3)
	Government Proceedings Act, Cap 77, Laws of Uganda 2000	Sections 3, 10
	Judicature Act, Cap 13, Laws of Uganda 2000	Rule 3, Rules SI 13-6, Rules SI13-14, Section 34(1)(a)
UKRAINE	Constitution	Art. 29
	Code of Criminal Procedure (20 November 2012)	Art. 316 para 2
	Act on Procedures for Compensating Citizens for Damages caused by the Unlawful Activities of Police, Pretrial Investigation, Procuratorial and Judicial Institutions	Arts. 2, 11
UZBEKISTAN	Constitution	Art. 44

<i>State</i>	<i>Legal instrument</i>	<i>Relevant provisions</i>
VENEZUELA, BOLIVARIAN REPUBLIC OF	Constitution of the Bolivarian Republic of Venezuela (Constitución de la República Bolivariana de Venezuela, 1999)	Art. 27
	Code of Criminal Procedure (Código Orgánico Procesal Penal, amended in June 2012)	Art. 123
	Law on Protection of Rights and Constitutional Guarantees (Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales)	Arts. 38, 39
